



**Internet Users' Perceptions of Child Exploitation Material:
Lessons for Prevention**

Charlotte Mary Hunn BA/LLB (Hons)
Faculty of Law

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STATEMENTS AND DECLARATIONS

DECLARATION OF ORIGINALITY

This thesis contains no material which has been accepted for a degree or diploma by the University or any other institution, except by way of background information and duly acknowledged in the thesis, and to the best of my knowledge and belief no material previously published or written by another person except where due acknowledgement is made in the text of the thesis, nor does the thesis contain any material that infringes copyright.

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The research associated with this thesis abides by the international and Australian codes on human and animal experimentation, the guidelines by the Australian Government's Office of the Gene Technology Regulator and the rulings of the Safety, Ethics and Institutional Biosafety Committees of the University.

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ABSTRACT

Fewer than 15 years ago, the Australian federal government criminalised the ‘accessing’ or, in lay terms, the online ‘viewing’ of child exploitation material (CEM). National statistics reveal that prosecutions for this offence are a consistent feature of Australia’s criminal justice system. The stereotypical ‘paedophile offender’ is commonly invoked to explain the prevalence of such offending. Yet a growing body of evidence appears to indicate that the online viewing of CEM is a more mainstream activity than suggested by such a stereotype. Of concern in this context, recent Australian studies purport to have found evidence of a ‘disjuncture’ between the perceptions of some members of the community and the criminalisation of this activity. While the evidence is limited, researchers speculate that the criminality of viewing CEM may not be widely appreciated in Australia. To better illuminate and understand this purported disjuncture, this thesis presents original findings from two empirical studies.

The first study explores the perceptions of Australian internet users (N=504) towards the online viewing of CEM. This study finds gaps in participants’ knowledge of the law, with significant proportions of participants failing to identify the criminality of viewing prohibited material. This study also reveals gaps in participants’ awareness about the potential for the viewing of CEM to affect victims, other offenders, society and viewers.

The second study assesses the value of judicial sentencing remarks (N=57) in educating the Australian community about the criminality of viewing CEM online. This study finds that while remarks represent a primary ongoing opportunity for communication, their value is limited. Even leaving aside practical questions about their dissemination, a significant proportion of the remarks analysed did not contain any normative explanations of why the offender’s behaviour was criminal.

This thesis uses two theoretical lenses to consider the implications of these findings for the prevention of onset — the first deliberate viewing of CEM online. Taking the notion of the ‘Opportunistic Offender’ from Situational Crime Prevention theory, this thesis contends that under the current policy settings, Australia is missing an opportunity to reduce the likelihood of onset for some individuals. To underline the

significance of this oversight, this thesis uses legal theory to demonstrate that this policy deficiency means that Australia is falling short of its duty to publicise the law, and ensure citizens have fair warning of criminalisation. Informed by these findings, this thesis recommends changes to public policy, legislation and judicial practice.

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CHAPTER 1: INTRODUCTION

1.1 RESEARCH PURPOSE

Fewer than 15 years ago, the Australian federal government criminalised the ‘accessing’ of CEM, or in lay terms, the online viewing of such material. In doing so, the government claimed that this behaviour ‘rightly outrages the Australian community’.¹ Until recently, there was little reason to question this claim. In 2015, two pilot studies found evidence that some members of the Australian community held opinions and beliefs that, far from reflecting outrage, implied a degree of ambivalence — or even disagreement — about criminalisation. Researchers characterised this incongruity as a ‘disjuncture’.² This thesis seeks to explore this disjuncture further, focusing on the online viewing of CEM. To do so, it collects and analyses the knowledge and attitudes of Australian internet users (N=504), identifying gaps between their perceptions of what is criminal and what is criminalised. Expanding focus, this thesis also assesses the value of judicial sentencing remarks (N=57) to educate the Australian community about the normative basis for criminalising the viewing of CEM. Marrying findings with criminological and legal theory, this thesis identifies the implications of this disjuncture for the prevention of ‘onset’ — the first time an individual deliberately views CEM.³

1.2 TERMINOLOGY AND BACKGROUND

1.2.1 The Concept of Criminalisation

This thesis is concerned with public perceptions of the criminalisation of the viewing of CEM online. At the outset, it is necessary to set out the concept of criminalisation

¹ Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004 (Cth) 2.

² Jeremy Prichard et al, ‘Tertiary Education Students’ Attitudes to the Harmfulness of Viewing and Distributing Child Pornography’ (2016) 23(2) *Psychiatry, Psychology and Law* 224, 234; Marg Liddell and S Caroline Taylor, ‘Women’s Experience of Learning about the Involvement of a Partner Possessing Child Abuse Material in Australia’ (PartnerSPEAK, 2015) <<https://drive.google.com/file/d/0Bxw6LzR1TJpTZ0t3amlwdjNXMnc/view>> 43.

³ Jeremy Prichard, Paul A Watters and Caroline Spiranovic, ‘Internet Subcultures and Pathways to the Use of Child Pornography’ (2011) 27(6) *Computer Law & Security Review* 585, 587.

as used in this thesis. This thesis adopts the well-established definition put forward by Simester and von Hirsch, that criminalisation is the process whereby the State:

declares that ϕ ing is morally wrongful; it instructs citizens not to ϕ ; it warns them that, if they ϕ , they are liable to be convicted and punished within specified ranges (the levels of which signal the seriousness with which ϕ ing is regarded); and, further, the state undertakes that, on proof of D's ϕ ing, it will impose an appropriate measure of punishment, within the specified range, that reflects the blameworthiness of D's conduct.⁴

While some types of behaviours relating to CEM have been criminal for nigh on 50 years, the viewing of CEM was not designated a crime in Australia until the early 2000s. In 2004, 'accessing' CEM became a crime under federal law.⁵ Subsequently, and in apparent duplication, Tasmania and South Australia introduced the offence of accessing into their own crimes legislation.⁶ This thesis focuses on the federal provision, which applies in all Australian jurisdictions.⁷

1.2.2 A Brief History of the Criminalisation of Accessing in Australia

The declaration of accessing as a crime has its roots in the late 1970s, when Australian legislatures at the territory, state, and federal level first sought to regulate CEM. Prior to the 1970s, no Australian criminal law statute included a specific offence that had anything to do with sexually explicit material involving children. Nor was the presence of CEM a prominent issue on the Australian social or political agenda.⁸ This shifted dramatically in the late 1970s after a visit to Australia by two prominent American 'anti-child pornography crusaders'.⁹ During their visit, Dr

⁴ Andrew P Simester and Andreas Von Hirsch, *Crimes, Harms, and Wrongs: On The Principles of Criminalisation*, Studies in Penal Theory and Penal Ethics (Hart Publishing, 2011) 6.

⁵ *Criminal Code 1995* (Cth) s 474.19(1)(a)(i).

⁶ *Criminal Code 1924* (Tas) s 130D; *Criminal Law Consolidation Act 1935* (SA) s 63A(1)(b). Note also, summary offences remain see, eg, *Classification (Publication, Films and Computer Games) Enforcement Act 1995* (Tas) s 74A. See also Tasmania, *Parliamentary Debates*, Legislative Assembly, 14 June 2005, 22–86 (Judith Jackson) (offences relating to a 'child abuse product' were retained to provide for the prosecution of less serious cases, before a magistrate).

⁷ *Criminal Code 1995* (Cth) s 3.

⁸ Barbara Ann Sullivan, *The Politics of Sex: Prostitution and Pornography in Australia since 1945* (Cambridge University Press, 1997) 166.

⁹ Tina M Beranbaum et al, 'Child Pornography in the 1970s' in Ann Wolbert Burgess and Marieanne Lindeqvist Clark (eds), *Child Pornography and Sex Rings* (Lexington Books, 1984) 7–8.

Densen-Gerber and Dr Baden pointed to the enormous amount of CEM available in Sydney to explain the increasing reports of child sexual abuse in Australia.¹⁰ These comments struck a chord in an era in which public awareness and concern about the physical treatment and abuse of children was growing in Australia¹¹ and around the world.¹² The ‘public furore’ triggered by these comments was further fueled by sensationalist media reporting.¹³ Media reports stated that since 1975 sexual images of children might be ‘freely available’ under the classification framework.¹⁴

Introduced by the Whitlam Labor government, the classification framework replaced the strict censorship model that had controlled what Australians could read, see and hear since before federation.¹⁵ In place of censorship, whereby the government saw its role as protecting the public from ‘obscenity’,¹⁶ the new libertarian approach sought to classify material with reference to transparent statutory criteria that rested on the maxim: ‘nothing is banned, only restricted if necessary’.¹⁷ An increase in community dissatisfaction with Australia’s approach to regulating material precipitated this major

¹⁰ Sullivan, above n 8, 166. See also Judianne Densen-Gerber, ‘What Pornographers Are Doing to Children: A Shocking Report’ (1977) 149 *Redbook Magazine* 86 (claiming ‘at least 264 different boy and girl porn magazines (were) being sold in adult bookstores nationwide’); Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet* (New York University Press, 2001) 33 (pointing out that in the 1980’s the problem of CEM was directly linked to missing children).

¹¹ Dorothy Scott and Shurlee Swain, *Confronting Cruelty: Historical Perspectives on Child Abuse* (Melbourne University Press, 2002) 120–121.

¹² Henry Kempe et al, ‘The Battered-Child Syndrome’ (1984) 251(24) *American Medical Association* 3288, 3294 (international context); Dora Bialestock, ‘Neglected Babies: A Study of 289 Babies Admitted Consecutively to a Reception Centre’ (1966) (2) *Medical Journal of Australia* 1129 (Australian context); Robert Birrell and John Birrell, ‘The Maltreatment Syndrome in Children’ (1966) 2(24) *The Medical Journal of Australia* 1134 (Australian context); Scott and Swain, above n 11, 120 (explaining the ‘child protection movement’).

¹³ Sullivan, above n 8, 6.

¹⁴ Richard G Fox, ‘Censorship Policy and Child Pornography’ (1978) 52 *The Australian Law Journal* 361, 368; Sullivan, above n 8, 167; Judith Brett, James A Gillespie and Murray Goot, *Developments in Australian Politics* (Macmillan Education Australia, 1994) 376.

¹⁵ Brett, Gillespie and Goot, above n 14, 379; Nicole Moore, *The Censor’s Library* (University of Queensland Press, 2012) 256–268; Hayley Boxall, Adam M Tomison and Shann Hulme, ‘Historical Review of Sexual Offence and Child Sexual Abuse Legislation in Australia: 1788-2013’ (Australian Institute of Criminology, 2014).

¹⁶ The concept of ‘obscenity’ derives from the English common law case of *R v Hicklin* (1868) LR 3 QB 360 [371] (‘I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall’ (Cockburn CJ)).

¹⁷ Gareth Griffith, ‘Censorship in Australia: Regulating the Internet and Other Recent Developments’ (NSW Parliamentary Library Research Service, 2002) 3; Fox, above n 14, 363.

shift in political philosophy.¹⁸ This new approach recognised that Australia was a ‘community of diverse standards’ within which the role of the government was to facilitate individual choice, within reason.¹⁹ Explaining this new philosophy, the then Federal Minister for Customs and Excise, Don Chipp stated:

censorship should be open to public scrutiny; the amount of censorship should be as little as possible, within the limits set by community standards; and in the ultimate, all members of the community, especially parents, I repeat, have the prime responsibility; the community cannot simply sit back and expect the Government to protect it.²⁰

However, public outrage over claims alleging that CEM was freely available in Australia led to a major policy reassessment.²¹ In April 1977, federal, state and territory ministers agreed that a new legislative response was needed.²² To address what was described as the ‘newly perceived social evil’,²³ state and territory governments amended²⁴ and enacted legislation,²⁵ while the federal government toughened points of importation.²⁶ Under these changes, it became a crime to procure a child for the production of CEM, produce, reproduce and distribute material.²⁷ Yet,

¹⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 June 1970, 3372 (Don Chipp).

¹⁹ Griffith, above n 17, 3; Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012) 32.

²⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 June 1970, 3376 (Don Chipp).

²¹ Sullivan, above n 8, 167.

²² Fox, above n 14, 368.

²³ Ibid 368.

²⁴ For example, the Tasmanian government amended the *Restricted Publication Act 1974* (Tas) ss 8, 12 introducing an explicit prohibition on ‘child abuse publications’.

²⁵ For example, the Victorian government introduced the *Police Offences (Child Pornography) Act 1977* (Vic).

²⁶ Fox, above n 14, 368.

²⁷ *Restricted Publication Act 1977* (Tas) s 12, inserting s 13B(c) into the *Restricted Publication Act 1974* (Tas); *Police Offences Child Pornography Act 1977* (Vic) s 2(b) inserting s 168A into the *Police Offences Act 1958* (Vic).

despite criticism,²⁸ state and territory governments drew the line at criminalising the possession of CEM, unless the material was possessed ‘for gain’.²⁹

This changed in the 1980s, as momentum grew behind the children’s rights movement³⁰ culminating, at the end of the decade, with the opening for signature of the *United Nations Convention on the Rights of the Child 1989* (‘CRC’).³¹ The CRC was the first legally binding international instrument to attempt to state the rights of the child comprehensively.³² Article 34 imposes an obligation on State Parties to protect children from child sexual abuse, with specific reference to ‘the exploitative use of children in pornographic performances and materials’.³³ Following swiftly on the heels of ratification, the Australian Law Reform Commission (‘ALRC’) recommended all Australian jurisdictions prohibit the ‘mere possession’ of CEM to ensure compliance with the CRC.³⁴ Over the next few years, state and territory governments respond by amending their legislation to include the offence of simple possession.³⁵

In the 1990s, concern about the threat that new technologies posed for the regulation of content, both offline and online, prompted further major changes to the Australian legislative landscape at the national level.³⁶ This began in 1995, when the Howard

²⁸ See, eg, Victorian, *Parliamentary Debates*, Legislative Council, 28 April 1977, 8245 (Bernard Phillip Dunn) (‘the Government should have made a straight-out decision to stop child pornography whether it is for gain or not’); Fox, above n 14, 368 (‘is less the prevention of adult corruption than the control of child abuse and exploitation by reducing the market for publications which depict it’).

²⁹ Markus Dirk Dubber, ‘Policing Possession: The War on Crime and the End of Criminal Law’ (2001) 91(4) *The Journal of Criminal Law and Criminology* 829, 855. As an aside, this approach was consistent with obscenity law more broadly under which governments did not attempt to regulate ‘private sexual titillation’ see, eg, *Buckley v Szadurski* [1973] VR 28 (the case involved the ‘making’, by the accused, of a number of Polaroid photos of a naked woman).

³⁰ Trevor Buck, *International Child Law* (Routledge, 2011) 91.

³¹ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

³² Sharon Detrick, *A Commentary on the United Nations Convention on the Rights on Child* (Martinus Nijhoff Publishers, 1999) 721.

³³ CRC art 34(3).

³⁴ ALRC, *Censorship Procedure*, Report No 55 (1991) [5.17].

³⁵ See, eg, *Classification of Films and Publication (Amendment) Act 1993* (Vic) s 3 inserting 60A (1) into the *Classification Act 1990* (Vic).

³⁶ Jennifer Stewart, ‘If this is the Global Community, we must be on the Bad Side of Town: International Policing of Child Pornography on the Internet’ (1997) 20(1) *Houston Journal of International Law* 205, 226; Patrick Forde and Andrew Patterson, ‘Paedophile Internet Activity’ (1998) 97 *Trends and Issues in Crime and Criminal Justice*, 3 (claiming there was ‘extensive paedophile

Liberal Government introduced a uniform national regime through which to classify publications, films and computer games.³⁷ This was followed by amendments to regulate online content under the *Broadcasting Services Act 1999* and the *Crimes Act 1914*.³⁸ Yet, because of the division of powers under the Australian Constitution, the federal government had to rely on the states and territories to implement enforcement regimes.³⁹

This changed in 2004, as part of what the government called its ‘proactive approach to updating criminal laws in light of [...] rapid technological change’.⁴⁰ After repealing the telecommunication offences in the *Crimes Act 1914*,⁴¹ the government used its power to regulate a ‘carriage service’,⁴² to insert a host of ‘new and updated’ telecommunication offences into the *Criminal Code* (Cth).⁴³ Among this host of new offences, it became an indictable federal offence for a person to use a carriage service ‘to access’ CEM in Australia.⁴⁴

activity and organisation’ in open access areas of the internet); Parliamentary Joint Committee on the National Crime Authority, ‘Organised Criminal Paedophile Activity’ (Commonwealth of Australia, 1995) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/acc/completed_inquiries/pre1996/ncapedo/report/index> 3.65 (identifying that computers may become a key means through which CEM is distributed, albeit also observing that ‘[s]o far, there appears to be no firm evidence that computers are being used to this extent’).

³⁷ *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

³⁸ *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) Sch 1, 2 amending the *Broadcasting Services Act 1992* (Cth) and the *Crimes Act 1914* (Cth) respectively. For further commentary, see generally John Corker, Stephen Nugent and Jon Porter, ‘Regulating Internet Content: A Co-Regulatory Approach’ (2000) 23(1) *Forum – Internet Content Control* 198, 198.

³⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 1994, 1381 (Michael Lavarch). See also Electronic Frontiers Australia, ‘A Brief History of Internet Regulatory Activity in Australia’ in Kaye Healey (ed), *Censorship* (The Spinney Press, 1997) 33; Commonwealth, *Parliamentary Debates*, Senate, 21 April 1999, 3957 (Ian Campbell). For an example of the state enforcement regime see, *Classification (Publications Films and Computer Games) Enforcement Act 1995* (Tas) Part 8 (as of 12 December 2000).

⁴⁰ Commonwealth, *Parliamentary Debates*, Senate 24 June 2004, 24848 (Ian Campbell).

⁴¹ *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004* (Cth) sch 1, Pt 2, s 5 repealing Part VIIB of the *Crimes Act 1914* (Cth).

⁴² *Australian Constitution* s 51(v). See also *Hale v R* [2011] NSWDC 97 [24], [27] (the ‘infrastructure and a means of access to the Internet’).

⁴³ *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004* (Cth) sch 1, Pt 1, s 1 inserting Part 10.6 into the *Criminal Code 1995* (Cth); Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No. 2) 2004 (Cth).

⁴⁴ *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004* (Cth) sch 1, Pt 1, s 1 inserting Part 10.6 into the *Criminal Code 1995* (Cth) s 474.19(1)(a)(i).

However, while describing the act — or even the process — of criminalisation is relatively straightforward, contention surrounds the question of justification. This question attracts much philosophising, with arguments put forward based on immorality,⁴⁵ the occasioning of harm⁴⁶ and derivations of this theme (e.g., that the harm must be ‘wrongful’),⁴⁷ among others.

Although an extensive review of explanations for criminalising the viewing of CEM as put forward in the literature is undertaken in the following chapter, it is beyond the scope of this thesis to interrogate their philosophical basis. That said, the question of how *convincing* an explanation for criminalisation needs to be is considered further in the following chapter (see, 2.1).⁴⁸

1.2.3 The Current Law – The Act of Accessing

As foreshadowed above, this thesis is concerned with the act of viewing CEM online. As used in the literature, the use of the term ‘viewing’ appears to carry its ordinary and natural meaning, that is, ‘[t]he action of inspecting or looking at something’.⁴⁹ This does not necessarily denote a particular legal definition of action capable of supporting a particular offence.⁵⁰

Yet in Australia, this act contravenes prohibitions on accessing CEM.⁵¹ Under federal law, this offence is committed when an individual displays material on the screen of

⁴⁵ Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) 12–13.

⁴⁶ John Stuart Mill, *On Liberty* (John W Parker and Son, 1859) 12–22.

⁴⁷ Simester and Von Hirsch, above n 4, 21–22, 29–30; Nina Peršak, *Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts* (Springer Science & Business Media, 2007) 9–34.

⁴⁸ That said, for commentary on the question of what ‘evidence’ is see, eg, Greg Marston and Rob Watts, ‘Tampering With the Evidence: A Critical Appraisal of Evidence-Based Policy-Making’ (2003) 3(3) *The Drawing Board: An Australian Review of Public Affairs* 143, 145; Alfred Blumstein, ‘Bringing Evidence into Criminal Justice Policy’ in Thomas G Blomberg et al (eds), *Advancing Criminology & Criminal Justice Policy* (Routledge 2016) 461, 461.

⁴⁹ *Oxford Dictionary of English* (Oxford University Press, 2010).

⁵⁰ See, eg, Alisdair A Gillespie, *Child Pornography Law and Policy* (Routledge, 2011) 39 (defining the act of ‘viewing’ as the conduct of ‘an offender who is simply browsing the internet for child pornography material without intentionally downloading them’). The term ‘consumption’ is also used see, eg, Richard Wortley and Stephen Smallbone, *Internet Child Pornography: Causes, Investigation and Prevention* (Praeger, 2012) 2–4.

⁵¹ *Criminal Code 1995* (Cth) s 474.19(1); *Criminal Law Consolidation Act 1935* (SA) s 63A(1)(b); *Tasmanian Criminal Code 1924* (Tas) s 130D. For further commentary see Jonathan Clough, ‘Now you see it, now you don’t: Digital images and the meaning of possession’ (2008) *Criminal Law Forum*

an electronic device (e.g., a computer).⁵² Strictly speaking, the terms ‘accessing’ and ‘viewing’ are not interchangeable in a legal context; it is unclear whether accessing requires an individual to have actually viewed the material displayed on the screen of the electronic device.⁵³ That said, to hold an accused criminally responsible for accessing, the prosecution must also establish that the accused intended, or meant to access the material,⁵⁴ and that the accused was ‘reckless’ as to whether the material was CEM.⁵⁵

The case of *R v Molloy* [2008] SASC 352 provides a useful illustration. In this case, the prosecution secured a conviction on the basis of evidence that, since the accused was in the habit of searching for and downloading material using the search terms ‘10yo’, ‘pre-teen’ and ‘young candid video’, he ‘must have been at least aware of the substantial risk that there was child pornography material on his files’.⁵⁶

Although accessing is generally regarded as the least serious CEM offence,⁵⁷ this thesis focuses on accessing primarily because the prevalence of CEM online means viewing is most likely to be the first behaviour through which an individual contravenes CEM law.

1.2.4 The Current Law – Defining Child Exploitation Material

In Australia, the terms used to refer to material that is definable as CEM are not uniform across jurisdictions. While most jurisdictions avoid the term ‘child pornography’ it remains in federal legislation (i.e., ‘child pornography material’).⁵⁸

19(2) 205, 233 (noting that the inclusion of the offence of accessing to the Australian legislative framework has overcome many of the difficulties associated with prosecuting individuals for the offence of possession in the digital age).

⁵² *Criminal Code 1995* (Cth) s 473.1.

⁵³ *R v Finnigan (No. 3)* [2015] SADC 166 [89].

⁵⁴ *Criminal Code 1995* (Cth) s 474.19(2)(a) (‘intention’); *Criminal Code 1995* (Cth) s 5.2(1). (‘meant’); Explanatory memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No. 2) 2004 (Cth).

⁵⁵ *Criminal Code 1995* (Cth) s 474.19(1)(b) and s 5.4(4).

⁵⁶ *R v Molloy* [2008] SASC 352 [25] (Kelly J).

⁵⁷ Less serious even than possession, see *Colbourn v The Queen* [2009] TASSC 108 at [33] (Blow J); *R v Talbot* [2009] TASSC 107 [9] (Blow J); Cf *Taylor v The Queen* [2015] TASCCA 7 [13] (Pearce J).

⁵⁸ *Criminal Code 1995* (Cth) s 473.1 ‘child pornography material’. Note, that *Criminal Code Compilation Act 1913* (WA) s 217A also uses the term ‘child pornography’ whereas other jurisdictions use other terms. See, eg, *Criminal Code 1924* (Tas) s 1A ‘child exploitation material’; *Criminal Code*

The term child pornography is also commonly used in the literature and in international law instruments.⁵⁹ The use of this term is increasingly criticised for ‘minimising the material’s inherently abusive nature’.⁶⁰ In line with a wider effort to eradicate the use of the term ‘child pornography’, this thesis uses the term ‘child exploitation material’ which is abbreviated to CEM, as introduced above. This is the term used in Tasmania, where this thesis was written. In addition, the use of this term recognises that material definable as CEM extends beyond depictions and descriptions of children being subjected to sexual abuse to include behaviour involving ‘no actual contact’ with a child.⁶¹

The federal provision covers ‘material in any form, or combination of forms, capable of constituting a communication’.⁶² A ‘communication’ includes material that ‘depicts’ or ‘describes’ data from which ‘a visual image (whether still or moving) can be generated’ and data from which ‘text or sounds can be generated’.⁶³ In other words, the federal definition includes all visual, written and audio material.⁶⁴

To be definable as CEM, material must fall within one of the two main limbs of the definition. The first limb covers material that depicts, describes or implies a person in a ‘sexual activity’ or a ‘sexual pose’ (whether in the presence of another person or

1899 (Qld) s 207A ‘child exploitation material’; *Criminal Law Consolidation Act 1935* (SA) s 62 ‘child exploitation material’; *Criminal Code Act Compilation Act 1913* (WA) s 217A ‘child exploitation material’ and ‘child pornography’; and, *Crimes Act 1900* (ACT) s 64 ‘child exploitation material’.

⁵⁹ See, eg, CRC art 34(c); *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 277 (entered into force 18 January 2002) art 2(c); *Convention on Cybercrime*, opened for signature 23 November 2001, ETS No 185 (entered into force 1 July 2004) art 9(2).

⁶⁰ Anthony R Beech et al, ‘The Internet and Child Sexual Offending: A Criminological Review’ (2008) 13(3) *Aggression and Violent Behavior* 216, 218.

⁶¹ Ethel Quayle and Roberta Sinclair, ‘An Introduction to the Problem’ in Ethel Quayle and Kurt M Ribisl (eds), *Understanding and Preventing Online Sexual Exploitation of Children* (Routledge, 2012) 5.

⁶² *Criminal Code 1995* (Cth) s 473.1. Note, a ‘communication’ is a form of communication carried by a ‘carriage service’, by a carriage service provider, that is, someone who supplies ‘a listed carriage service to the public’ as per *Telecommunications Act 1997* (Cth) s 87; See also Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004 inserting s 474.17.

⁶³ *Criminal Code 1995* (Cth) s 473.1.

⁶⁴ Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No. 2) 2004 (Cth).

not); and the second limb covers material the ‘dominant characteristic’ of which is the depiction, or representation, of a sexual organ, the anal region or the breasts (of a female) for a ‘sexual purpose’.⁶⁵ While the inclusion of the phrase ‘sexual activity’ is self-explanatory, the additional phrases ‘sexual pose’ and ‘dominant characteristic’ for a ‘sexual purpose’ clarify that this definition does not include images such as ‘innocent family photographs of children’.⁶⁶

The material must also depict or describe a person, or a representation of a person, who is, appears to be, or is implied to be (in some circumstances) under 18 years of age.⁶⁷ As Malcolm CJ explained in *Holland v The Queen* [2005] WASCA 140, this extends the definition to ‘real, imaginary and fictitious persons.’⁶⁸ The case of *McEwen v Simmons* [2008] NSWSC 1292 provides a practical illustration. In this case, the court held that the term ‘persons’ extended to include a series of cartoons depicting figures of the child characters from the television show ‘The Simpsons’ involved in ‘sex acts’.⁶⁹ In finding that these characters were ‘persons’, Adam J stated that the ‘mere fact that the figure depicted departed from a realistic representation in some respects of a human being did not mean that such a figure was not a “person”’.⁷⁰

In other words, as Adam J observed, ‘[n]o bright line of inclusion or exclusion can be sensibly described’⁷¹ to clarify who, or what is a person under the federal definition, albeit there is a ‘continuum’.⁷² That said, the ultimate test of whether material will or will not fall within the federal definition turns on whether the material in question depicts or describes a ‘person’ in a ‘way that reasonable persons would regard as being, in all the circumstances, offensive’.⁷³ This is an objective test.⁷⁴ The

⁶⁵ *Criminal Code 1995* (Cth) s 473.1 (a)–(d).

⁶⁶ Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004 (Cth) 7.

⁶⁷ *Criminal Code 1995* (Cth) s 473.1(a).

⁶⁸ *Holland v The Queen* [2005] WASCA 140 [17].

⁶⁹ [2008] NSWSC 1292 [1] (Adam J).

⁷⁰ [2008] NSWSC 1292 [41].

⁷¹ [2008] NSWSC 1292 [40] (indeed, reinforcing this Adam J observed that giving ‘human characteristics to, say, ‘a rabbit’, is not alone sufficient to make the ‘rabbit’ a ‘person’ if it is ‘fair to say’ that the ‘rabbit’ remains a ‘rabbit’).

⁷² *McEwen v Simmons* [2008] NSWSC 1292 [40].

⁷³ *Criminal Code 1995* (Cth) s 473.1.

⁷⁴ *R v Silva* [2009] ACTSC 108 [32] (Penfold J); see also *NSW Police Force v X* [2014] NSWLC 23 [52] (Buscombe LCM). For further discussion see generally Tony Krone, ‘Does Thinking Make It So?’

‘reasonable person’ means reasonable members of the Australian community at the time the case is heard.⁷⁵ The federal legislation lists the matters that should be taken into account in determining this question including ‘the standards of morality, decency and propriety generally accepted by reasonable adults’; ‘the literary, artistic or educational merit (if any) of the material’; and, ‘the general character of the material (including whether it is of a medical, legal or scientific character)’.⁷⁶

The leading case on the parameters of what is ‘offensive’ is *Annetts v DPP (NSW) (No 2)* [2009] NSWDC 139 that involved footage filmed in a swimming pool change room.⁷⁷ In this case, William DCJ commented on the elasticity of the concept of offensiveness explaining that even if material is not offensive in the form it comes before the court, it can become so through editing, enhancement or by combination with other material.⁷⁸ Following this case, in *NSW Police Force v X* [2014] NSWLC 23, Buscombe LCM provided the following useful illustrative example:

To possess one image of a naked boy under 16 years of age not engaged in a sexual act might, arguably, not be offensive. To attach a note, however, making a lewd comment about the boy’s penis could, in my opinion, be taken into account in determining whether or not the image was offensive.⁷⁹

In the interests of clarity, this thesis draws a somewhat contrived distinction between two types of material: (1) material that involves a real child in its creation; and, (2) material that involves images and animations of representations of children but does not involve a real child. In the literature, the latter is commonly referred to as ‘virtual

Defining Online Child Pornography Possession Offences’ (Australian Institute of Criminology, 2005) 2.

⁷⁵ *R v Silva* [2009] ACTSC 108 [32] (Penfold J).

⁷⁶ *Criminal Code 1995* (Cth) s 473.4.

⁷⁷ *Annetts v DPP (NSW) (No 2)* [2009] NSWDC 139 [2] (Williams DCJ).

⁷⁸ *Ibid* at [19] (explaining that ‘[h]ad stills of this material been developed and hung on the defendant’s walls, or edited to concentrate on the person’s nudity and genitalia, or enhanced in some way or joined with other material, it could become an offensive depiction in a sexual context’); see also *R v Cemitis, Andrew* [No 1] [2010] NSWDC 158 [16] (material held to be ‘offensive’ on the basis that the ‘overwhelming focus of the material’ was on teenage girls who were depicted in various stages of undress with the material ‘replete with views of naked buttocks being dried, shiny, wet, naked buttocks emerging from the shower, pubescent breasts being dried’ (Nicholson SC DCJ)).

⁷⁹ *NSW Police Force v X* [2014] NSWLC 23 [64].

child pornography’,⁸⁰ although not without criticism.⁸¹ In this thesis, the prefix ‘virtual’ is adopted to differentiate such material from that which involves a real child, which is referred to as CEM. As used here, the term virtual-CEM includes virtual images and/or animations depicting representations of a fictitious child, or children, from hyper-realistic portrayals (e.g., ‘Sweetie’)⁸² through to anime, and other types of cartoon drawings that do not appear ‘real’.⁸³ Other types of materials under the umbrella of virtual-CEM include text-based or ‘narrative’ material⁸⁴ and morphed images or otherwise innocent images of a child that have been altered.⁸⁵ This contrived distinction facilitates the literature review of explanation for criminalisation as it reflects the divide between material that involves a real child in its creation, and that which does not (see, Chapter 2). In turn, this review has implications for how other aspects of the research undertaken in this thesis are approached including the analysis of judges’ sentencing remarks (Chapter 5) and the exploration of public perceptions (Chapter 6).

In the interest of completeness, it is noted that a number of scales are used to classify or grade material for the purposes of the criminal justice system. Although primarily used in the academic and clinical context, the first scale to be developed was the ‘Combating Paedophile Information Networks in Europe’ (COPINE) scale.⁸⁶ This scale was modified by the United Kingdom Sentencing Council ‘to avoid unnecessary

⁸⁰ See, eg, Gillespie, above n 50, 89–100 (defining ‘virtual child pornography’ as ‘computer generated images’ that is, ‘fictitious child pornography in that a child was never involved’).

⁸¹ Marie Eneman, Alisdair A Gillespie and Bernad Carsten Stahl, ‘Criminalising Fantasies: The Regulation of Virtual Child Pornography’ (Paper presented at the Proceedings of the 17th European Conference on Information Systems, Verona, Italy, 2009) 4.5 (pointing out that by using the term ‘child pornography’ or to that end, ‘child exploitation material’ together with ‘virtual’ imports ‘strong moral connotations and thereby forces discourses in a particular direction’).

⁸² Mitali Thakor, ‘The Allure of Artifice: Deploying a Filipina Avatar in the Digital Porno-Tropics’ in Cyd Cipolla et al (eds), *Queer Feminist Science Studies: A Reader* (University of Washington Press, 2017) 141–142.

⁸³ Alisdair A Gillespie, ‘Child Pornography’ (2018) 27(1) *Information & Communications Technology Law* 30, 43.

⁸⁴ Hannah L Merdian, *Offenders Who Use Child Sexual Exploitation Material: Development of an Integrated Model for Their Classification, Assessment and Treatment* (Doctor of Philosophy Thesis, The University of Waikato, 2012) 226.

⁸⁵ Yaman Akdeniz, *Internet Child Pornography and the Law: National and International Responses* (Routledge, 2016) 20.

⁸⁶ Max Taylor, Gemma Holland and Ethel Quayle, ‘Typology of Paedophile Picture Collections’ (2001) 74 *The Police Journal* 97, 101.

disputes in court as to the precise category into which a particular image falls'.⁸⁷ The modification reduced the number of categories from 10 to five; a change intended to reflect the degree of harm to victims⁸⁸ and ensure that the categories within this scale did not extend beyond material legally definable as CEM.⁸⁹ The revised scale was approved by the United Kingdom Court of Appeal (Criminal Division) in the case of *R v Oliver* [2003] 1 Cr App R 28.⁹⁰ The *Oliver* scale,⁹¹ inclusive of latter adaptations made by the United Kingdom Sentencing Council, has five levels extending from Level 1, 'images depicting erotic posing with no sexual activity' through to Level 5, 'sadism or penetration of, or by, an animal'.⁹²

In Australia, the five levels of the COPINE scale or *Oliver* scale are commonly used.⁹³ The prominence of these scales continues, despite a push since 2010 for Australian law enforcement agencies to classify material using the Australian National Victim Image Library (ANVIL). The stated objective was to 'more effectively and efficiently identify child victims and their abusers, and minimise investigator exposure to child

⁸⁷ United Kingdom Sentencing Advisory Panel, 'Advice to the Court of Appeal – Offences involving Child Pornography' (Ministry of Justice, 2002) 4.

⁸⁸ *Ibid* 4.

⁸⁹ Taylor, Holland and Quayle, above n 86, 97 (making the point that the scale extended beyond legal definitions of CEM under European law); Tony Krone, 'A Typology of Online Child Pornography Offending' (Australian Institute of Criminology, 2004) 3 (making the same point with respect to Australian law).

⁹⁰ See generally Pierrete Mizzi, Tom Gotsis and Patrizia Poletti, 'Sentencing Offenders Convicted on Child Pornography and Child Abuse Material Offences' (Judicial Commission of New South Wales, 2010) <<https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/research-monograph-34.pdf>> 12.

⁹¹ *R v Oliver* [2003] 1 Cr App R 28 [10]. See also Mizzi, Gotsis and Poletti, above n 90, 47.

⁹² United Kingdom Sentencing Council, 'Sexual Offences Guideline Consultation' (Sentencing Council, 2012) 79 (In full, the five levels encompass: 'level one – images depicting erotic posing with no sexual activity; level two – non-penetrative sexual activity between children, or solo masturbation by a child; level three – non-penetrative sexual activity between adults and children; level four – penetrative sexual activity involving a child or children or both children and adults; and level five – sadism or penetration of, or by, an animal'. This scale has now been further adapted to three categories under the United Kingdom Sentencing Council, *Sexual Offences Definitive Guideline* (Sentencing Council, 2013) 76 ('images involving penetrative sexual activity', bestiality and sadism (Category A), to images not involving penetrative activity (Category B) and 'other indecent images' not falling within the above categories (Category C)).

⁹³ Kate Warner, 'Sentencing for Child Pornography' (2010) 84 *Australian Law Journal* 384, 386–387; Queensland Sentencing Advisory Council, 'Classification of Child Exploitation Material for Sentencing Purposes: Final Report' (Queensland Sentencing Advisory Council, 2017) <http://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0017/531503/cem-final-report-july-2017.pdf> 15.

exploitation materials’.⁹⁴ In comparison to the other approaches to categorisation, ANVIL includes a sixth category for material showing ‘[a]nimated or virtual depictions of children’ engaged in an act covered by the other five categories.⁹⁵ As an aside, and perhaps providing some explanation for the failure of ANVIL, in 2013 Microsoft withdrew its support for the ‘Child Exploitation Tracking System’ (CETS) upon which this database was based.⁹⁶ Although a number of Australian jurisdictions use the CETS/ANVIL classification,⁹⁷ according to a recent report the scheme has ‘failed to gain traction’.⁹⁸

1.3 THE RESEARCH CONTEXT

1.3.1 Rates of Accessing in Australia

As noted above, prohibitions on accessing appear in Tasmanian, South Australian and federal legislation (see, 1.2.3). In recent years, there have been a number of significant prosecutions for accessing offences under both South Australian and Tasmanian legislation, however neither of these jurisdictions provides statistics on the number of prosecutions for CEM offences.⁹⁹ The overlap between state and federal jurisdictions also makes it difficult to determine rates of accessing with precision. Yet national criminal justice statistics indicate that prosecutions for the accessing of CEM

⁹⁴ Editors, ‘Empower, protect and pursue’ (2010) 108(3) *Platypus Magazine: Journal of the Australian Federal Police* 1, 5.

⁹⁵ Tony Krone et al, ‘Online Child Sexual Exploitation Offenders: A Study of Australian Law Enforcement Data: Report to Criminology Research Advisory Council’ (Australian Institute of Criminology, 2017) <<http://crg.aic.gov.au/reports/1617/58-1213-FinalReport.pdf>> 39.

⁹⁶ Queensland Sentencing Advisory Council, above n 93, 50–51. See also Jonathan Clough, *Principles of Cybercrime* (Cambridge University Press, 2nd ed, 2015) 303.

⁹⁷ For recent example see, eg, *R v William Noel Arthur* [2017] ACTSC 23 [11].

⁹⁸ Queensland Sentencing Advisory Council, above n 93, 49–50, 66 (adding a further layer of confusion, in 2017 the Queensland Sentencing Advisory Council reported the AFP was considering implementing a further classification scheme – ‘Project-VIC’ – a United States initiative based on a four-category scheme similar to that used by INTERPOL (the *INTERPOL International Classification System*)).

⁹⁹ Office of the Director of Public Prosecutions, ‘Director of Public Prosecutions Annual Report 2014–2015’ (Director of Public Prosecutions, 2015) <<http://www.dpp.sa.gov.au/wp-content/uploads/2016/04/Annual-Report-2014-2015.compressed.pdf>>; Director of Public Prosecutions, ‘Annual Report 2016–17’ (Government of Tasmania, 2017) <http://www.dpp.tas.gov.au/__data/assets/pdf_file/0004/395905/Annual-report-2016-17.pdf>. Although note, the Tasmanian Sentencing Advisory Council provides sentencing statistics for the offence of possession of CEM, see Sentencing Advisory Council, *Supreme Court Sentencing Statistics – Possession of child exploitation material*, Tasmanian Government <<http://www.sentencingcouncil.tas.gov.au/statistics/supremecourt>>.

are a regular feature of the Australian criminal justice system. Over a single 12-month period, the Commonwealth Department of Public Prosecutions (CDPP) dealt with 270 indictable charges for accessing under s 474.19(1) of the *Criminal Code* (Cth).¹⁰⁰ To put this in context, this single provision accounted for almost 13 per cent of all indictable charges dealt with by the CDPP under the *Criminal Code* (Cth) over this period.¹⁰¹ Even so, criminal justice statistics do not provide a true picture of the prevalence of crime.¹⁰² Jenkins makes the point that such statistics ‘never include the vast majority of offenders’ but rather ‘those inept and seemingly atypical offenders who fail to take the obvious precautions and get caught’.¹⁰³ While this perhaps overstates the case, as even those who take ‘obvious precautions’ may get caught, it serves to emphasise that to properly grasp the research context it is necessary to look beyond criminal justice statistics.

1.3.2 The Availability of Child Exploitation Material

The development of the internet in conjunction with the advent of modern recording technology ‘revolutionized’ the availability and accessibility of CEM.¹⁰⁴ In simple terms, the internet is no more than layered networking infrastructure, which are colloquially termed the ‘Surface Web’, the ‘Deep Web’ and the ‘Dark Web’.¹⁰⁵ In recent years, while CEM continues to be found at web addresses (or URLs)¹⁰⁶ the availability of CEM on the Surface Web, the open access areas of the internet that are ‘readily accessible to the average user’, is declining.¹⁰⁷ In no small part, this can be

¹⁰⁰ Commonwealth Director of Public Prosecutions, *Statistics by Crimes Act/Criminal Code*, Government of Australia <<https://www.cdpp.gov.au/statistics/additional-tables>>.

¹⁰¹ Ibid.

¹⁰² Jenkins, above n 10, 13.

¹⁰³ Ibid.

¹⁰⁴ Wortley and Smallbone, above n 50, 26; Jonathan Clough, *Principles of Cybercrime* (Cambridge University Press, 2010) 247; Jennifer A McCarthy, ‘Internet Sexual Activity: A Comparison Between Contact and Non-Contact Child Pornography Offenders’ (2010) 16(2) *Journal of Sexual Aggression* 181, 181.

¹⁰⁵ Kristin Finklea, ‘Dark Web’ (Congressional Research Service, 2017) <<https://fas.org/sgp/crs/misc/R44101.pdf>> 3.

¹⁰⁶ Internet Watch Foundation, ‘IWF Annual Report 2016’ (IWF, 2016) <https://www.iwf.org.uk/sites/default/files/reports/2017-04/iwf_report_2016.pdf> 8.

¹⁰⁷ Bryce G Westlake and Martin Bouchard, ‘Criminal Careers in Cyberspace: Examining Website Failure within Child Exploitation Networks’ (2015) *Justice Quarterly* 1, 22; Cf Khalid Khan, ‘Child Pornography on the Internet’ (2000) 73 *The Police Journal* 7, 7–17 (claiming there were ‘large amounts’ of CEM easily accessible on the surface web).

attributed to the combined efforts of law enforcement agencies, multinational technology companies (e.g., Google)¹⁰⁸ and coalitions of private sector groups (e.g., the Asian-Pacific Financial Coalition Against Child Pornography).¹⁰⁹

For example, since mid-2013, a number of multinational technology companies, including Google, Microsoft, Yahoo, and YouTube, have implemented controls within their online platforms that aim to block and deter the viewing of CEM.¹¹⁰ Relevantly, this has changed the way in which search engines operate to prevent the indexing of CEM; as the Executive Chairman of Google explained, ‘we’ve fine-tuned Google search to prevent links to child sexual abuse material from appearing in our results’.¹¹¹ Despite acknowledged caveats around causality, there is evidence that these changes have had an impact.¹¹² Research shows a 67 per cent decline in the number of searches in the Surface Web following these changes.¹¹³

Yet a decline in the availability of CEM on the Surface Web does not imply a corresponding decline in the availability of CEM on the Deep Web where, according to Westlake and Bouchard, the vast majority of CEM resides.¹¹⁴ The size of the Deep Web ‘defies quantification’¹¹⁵ and most content is publicly available without restriction (97.4%), with remaining content accessible subject to limitations (such as subscriptions and/or fees).¹¹⁶ At the ‘furthest corners of the Deep Web’, the Dark Web

¹⁰⁸ Chad Steel, ‘Web-based Child Pornography: The Global Impact of Deterrence Efforts and its Consumption on Mobile Platforms’ (2015) 44 *Child Abuse and Neglect* 150, 150–158.

¹⁰⁹ International Centre for Missing & Exploited Children (ICMEC), *Industry Collaboration: Asia-Pacific Financial Coalition Against Child Pornography* <<https://www.icmec.org/apac-fcacp/>>.

¹¹⁰ Nicholas Watt and Juliette Garside, ‘Google to tackle images of child sexual abuse with search and Youtube changes’, *The Guardian* (online), 18 November 2013 <<https://www.theguardian.com/technology/2013/nov/18/uk-us-dark-web-online-child-abuse-internet>>.

¹¹¹ Eric Schmidt, “‘Weve listened – and heres how well halt this depravity’”: Google chief Eric Schmidt explains block on child porn’, *Daily Mail* (London) 18 November 2013 <<http://www.dailymail.co.uk/news/article-2509044/Google-chief-Eric-Schmidt-explains-block-child-porn.html>>.

¹¹² Steel, above n 108, 155.

¹¹³ *Ibid.*

¹¹⁴ Westlake and Bouchard, above n 107, 22; Vincenzo Ciancaglini Marco Balduzzi, Max Goncharov and Robert McArdle, ‘Deepweb and Cybercrime Its Not All About TOR’ (Trend Micro, 2014) <<https://www.trendmicro.com/vinfo/au/security/news/cybercrime-and-digital-threats/deep-web-and-cybercrime-its-not-all-about-tor>> 3 (explaining that the ‘deep web’ refers to content that is ‘for different technical reasons, not indexed by search engines’).

¹¹⁵ Finklea, above n 105, 3.

¹¹⁶ *Ibid* 1.

is only accessible using specialised encryption software (e.g., TOR).¹¹⁷ In a report published in 2015, Chertoff and Simon characterised the accessibility of CEM on the Dark Web as ‘extremely accessible’.¹¹⁸ Yet with the exception of research into Peer-to-Peer (P2P) networks, considered below, it is difficult to quantify the availability of CEM on the Deep Web or the Dark Web, because of the level of anonymity and security from surveillance afforded to users.¹¹⁹

Described as ‘vast’ global file-sharing systems, P2P networks are used by an ever-increasing number of individuals to ‘share’ both legal and illegal material.¹²⁰ It has been claimed that CEM offending is ‘endemic’ to P2P networks.¹²¹ This claim finds support in empirical research. In 2014, Bissias and colleagues estimated that across five P2P networks, 840 000 peers shared CEM, although this estimate only captures previously identified images.¹²² Latapy, Magnien and Fournier found that within a P2P network, two in every 1000 users (or 0.25%) entered paedophile queries (i.e. keyword searches).¹²³ Researching a period between 2010 and 2011, Wolak and colleagues found that over this period, almost 140 000 unique CEM files were shared on one P2P network.¹²⁴ This means that on an average day almost 10 000 unique CEM

¹¹⁷ Ibid.

¹¹⁸ Michael Chertoff and Toby Simon, ‘The Impact of Dark Web on Internet Governance and Cyber Security’ (Centre for International Governance Innovation and the Royal Institute for International Affairs, 2015) <https://www.cigionline.org/sites/default/files/gcig_paper_no6.pdf> 5.

¹¹⁹ Mark O’Brien, ‘The Internet, Child Pornography and Cloud Computing: The Dark Side of the Web?’ (2014) 23(3) *Information & Communications Technology Law* 238, 239; Audrey Rogers, ‘From Peer-to-Peer Networks to Cloud Computing: How Technology is Redefining Child Pornography Laws’ (2013) 87 *St John’s Law Review* 1013, 1033; Michael G Reed, Paul F Syverson and David M Goldschlag, ‘Anonymous Connections and Onion Routing’ (1998) 16(4) *IEEE Journal on Selected areas in Communications* 482, 482.

¹²⁰ Janis Wolak, Marc Liberatore and Brian N Levine, ‘Measuring a Year of Child Pornography Trafficking by U.S. Computers on a Peer-to-Peer Network’ (2013) 38(2) *Child Abuse and Neglect* 347, 348.

¹²¹ Margaret Brennan and Sean Hammond, ‘A Methodology for Profiling Paraphilic Interest in Child Sexual Exploitation Material User on Peer-to-Peer Networks’ (2016) *Journal of Sexual Aggression* 1, 2; Ryan Hurley et al, ‘Measurement and Analysis of Child Pornography Trafficking on Gnutella and eMule’ (Paper presented at the International World Wide Web Conference, Rio de Janeiro, Brazil, 2012) 1; Wolak, Liberatore and Levine, above n 120, 348.

¹²² George Bissias et al, ‘Characterization of Contact Offenders and Child Exploitation Material Trafficking on Five Peer-to-Peer Networks’ (2016) 52 *Child Abuse & Neglect* 185, 189.

¹²³ Matthieu Latapy, Clémence Magnien and Raphaël Fournier, ‘Quantifying Paedophile Activity in a Large P2P System’ (2013) 49(1) *Information Processing & Management* 248, 251.

¹²⁴ Wolak, Liberatore and Levine, above n 120, 351.

files were shared — this figure jumps to almost 123 000 if duplicate files are included.¹²⁵ These researchers also identified that during this same period more than three quarters of a million computers (n=775 941) located in 100 different countries shared CEM files.¹²⁶ This figure is a conservative estimate, as the researchers stress such figures may ‘considerably underestimate’ the number of computers involved.¹²⁷ Previous research estimated that the number of individuals sharing CEM files on P2P networks was as high as 1.8 million.¹²⁸

1.4 PUBLIC PERCEPTIONS OF CHILD EXPLOITATION MATERIAL – A DISJUNCTURE BETWEEN PUBLIC PERCEPTIONS AND THE LAW?

1.4.1 Judicial and Academic Commentary about Public Perceptions

For many years, judges in common law jurisdictions, and academics alike, have referred to the possibility of a disjuncture between public perceptions and CEM law. In the 1980s, Lord Lane CJ pointed out that ‘[t]here is some concern that people are simply looking at this [CEM] and really that is about all they are doing and that they are not really aware of the damage that it does’.¹²⁹

Despite the passage of time, judges continue to make reference to the possibility of a disjuncture. For example, in 2015, Hampel J expressed the hope that by identifying the reasons for treating CEM offending as a serious criminal offence in her sentencing remarks:

the broader community will stop calling it a victimless crime, and those who are tempted to access child pornography will not be able to rationalise it or to delude themselves that they are not participating in the victimisation of these children.¹³⁰

¹²⁵ Ibid 351.

¹²⁶ Ibid.

¹²⁷ Ibid 354.

¹²⁸ Ryan Hurley et al, above n 121, 1.

¹²⁹ *Russell* (1986) 8 Cr App R (S) 367.

¹³⁰ *DPP v Pearce* [2015] VCC 1486.

Making a similar point, in *DPP v Power* [2015] VCC 133 McInerney J emphasised the need for the federal government to do more to ‘advise and inform the community’ of the serious nature of this type of offending.¹³¹ His honour stated:

In my view, and I am fairly aware of publicity and television, there has been an abject failure by the Commonwealth to advise the community of the dangerous consequences of partaking in this crime.¹³²

A number of academics have made comments in a similar vein. In 2001, Jenkins criticised the social response, stating that society ‘scarcely recognized [CEM] as a distinct problem’.¹³³ A decade later, Jenkins commented further, asserting that except where the suspect was a celebrity or has an otherwise elevated social status, the ‘social response’ remained ‘virtually nil’.¹³⁴ Offering an explanation, Warner observes that ‘using the internet to access ... material may not appear to be serious criminality in a modern and permissive society’.¹³⁵

Echoing this, Wortley and Smallbone make the point that it is vital to reinforce the ‘abhorrent nature’ of CEM at the community level and confront perceptions that the downloading — and arguably the viewing — of CEM is a ‘victimless crime’.¹³⁶

1.4.2 What the Public Thinks about the Law – The Evidence

While the existence of a disjuncture is recognised by some judges and academics, apart from two recent Australian pilot studies discussed below, research into the possibility of a disjuncture between public perceptions and the law in this area is scant. One exception is a small pocket of northern hemisphere research examining perceptions of the viewing of virtual-CEM.

¹³¹ *DPP v Power* [2015] VCC 133 [7].

¹³² *Ibid* [6].

¹³³ Jenkins, above n 10, 6.

¹³⁴ Philip Jenkins, ‘Failure to Launch: Why Do Some Social Issues Fail to Detonate Moral Panics?’ (2009) 49(1) *British Journal of Criminology* 35, 37–38; Tony Krone, ‘International Police Operations Against Online Child Pornography’ (Australian High Tech Crime Centre, 2005)1 (noting the increasing amount of media attention given to CEM between 1976 and 2004).

¹³⁵ Warner, above n 93, 395.

¹³⁶ Wortley and Smallbone, above n 50, 125 (substituted words: ‘ICP’ and ‘downloading’).

In the United States in 2000, McCabe surveyed a cohort of 261 predominately female (56.5%) ‘family-oriented, middle-class homeowners’¹³⁷ aged between 21–64 years old.¹³⁸ McCabe found that more than 90 per cent of participants indicated that they felt viewing ‘computer generated’ CEM was ‘okay’.¹³⁹ In Canada, over a decade later, Lam, Mitchell and Seto surveyed 252 undergraduate psychology students ($M=18.9$ years, $SD=1.5$, female 64%).¹⁴⁰ Departing dramatically from McCabe’s study, more than 93 per cent of participants felt the use of computer-generated CEM images was ‘unacceptable’.¹⁴¹ In both studies, it was criminal to view such images at the time.¹⁴² Offering a more recent perspective, in 2016, Hitikasch, Merdian and Hogue surveyed 243 German community members ($M= 36.15$ years, $SD = 14.3$, Female 65%).¹⁴³ They found that more than 80 per cent of participants thought audio, animated material and computer generated images should be classified as CEM and over three quarters of participants felt a cartoon drawing should be classified as CEM.¹⁴⁴

As foreshadowed above, recent Australian research provides some empirical support for the existence of a disjuncture between public perceptions and the law, beyond virtual CEM. In 2015, Prichard and colleagues surveyed 431 Tasmanian tertiary students ($M=27.88$ years, $SD= 11.51$, female 70%).¹⁴⁵ Using a 15-item survey, the researchers examined levels of agreement for a range of ‘core legal explanations’ of the harms of viewing CEM involving a real child, as posited in the literature, anecdotal reports and other sources.¹⁴⁶ This research revealed that while most

¹³⁷ Kimberley A McCabe, ‘Child Pornography and the Internet’ (2000) 18(1) *Social Science Computer Review* 73, 74.

¹³⁸ Ibid 74.

¹³⁹ Ibid 75.

¹⁴⁰ Anita Lam, Jennifer Mitchell and Michael C Seto, ‘Lay Perceptions of Child Pornography Offenders’ (2010) 52(2) *Canadian Journal of Criminology and Criminal Justice* 173, 185.

¹⁴¹ Ibid 189.

¹⁴² McCabe, above n 137, 75–76; Lam, above n 140, 186.

¹⁴³ Mira Hitikasch, Hannah L Merdian and Todd Hogue, ‘Perceptions of Narrative Child Sexual Exploitation Material in a German Community Sample’ (2016) 11(2) *Sexual Offender Treatment* 1, 3.

¹⁴⁴ Ibid.

¹⁴⁵ Prichard et al, above n 2, 224–239.

¹⁴⁶ Ibid 229.

participants supported the explanations given, there were also areas of significant disagreement, as discussed in further detail later in this thesis.¹⁴⁷

Yet, it appears that one of the main reasons for disagreement may be a lack of awareness about the effects of viewing CEM. For instance, the researchers found that more than 10 per cent of participants were unable to comprehend that a child may suffer further harm from someone viewing the material in which they are depicted.¹⁴⁸ The researchers further found that seven per cent of participants thought that viewing CEM should not be illegal where it depicts a real child.¹⁴⁹ This proportion increased to 21.3 per cent when participants were asked about computer-generated, or virtual-CEM.¹⁵⁰

Also in 2015, Liddell and Taylor conducted a small study to explore the experiences of Australian women whose partners had been charged with possessing CEM.¹⁵¹ The nine female participants in the study ranged in age from late 20s to mid-60s and were members of *PartnerSPEAK*.¹⁵² The researchers found that these women commonly experienced denial and/or ignorance about the seriousness of CEM possession from others.¹⁵³ For example, a number of participants received comments from friends and family that minimised the seriousness of their partner's behaviour (e.g., 'They are only pictures so what is the harm').¹⁵⁴ Liddell and Taylor's study gives further cause to suggest a disjuncture exists with respect to viewing. Reflecting on their results, the researchers expressed concern that 'people watching videos or looking at pictures don't connect that in order for this to be available, they have been responsible for commissioning serious abuse of children'.¹⁵⁵

¹⁴⁷ Ibid 230.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid 232.

¹⁵⁰ Ibid.

¹⁵¹ Liddell and Taylor, above n 2.

¹⁵² Ibid 1 (*PartnerSPEAK* is a confidential online support forum for individuals concerned about a partner or other family member viewing CEM).

¹⁵³ Ibid 43.

¹⁵⁴ Ibid 41.

¹⁵⁵ Ibid 43.

Going further, research into public perceptions of sentencing preferences for CEM offending offers another indicator that, at the very least, public perceptions are murky as far as the seriousness of viewing CEM is concerned.

For example, in 2008, Mears and colleagues surveyed a representative sample of 425 Americans.¹⁵⁶ The researchers found ‘potential cleavages in American society’ regarding the appropriate sanctioning of individuals who access CEM.¹⁵⁷ Only 68 per cent of participants felt that imprisonment was the most appropriate punishment for accessing CEM,¹⁵⁸ while 15 per cent preferred community-based treatment, 11 per cent preferred probation, and seven per cent felt that a fine was the most appropriate punishment.¹⁵⁹

In 2011, Nicholls and colleagues used a combination of focus groups and in-depth-interviews to explore public and victim/survivor perspectives on sentencing for sexual offences in the United Kingdom.¹⁶⁰ The researchers found conflicting views about the appropriate length of a custodial sentence for an adult male convicted of downloading ‘pornographic images of young children’.¹⁶¹ Most participants wanted longer custodial sentences because of concern that looking at CEM fuelled demand and caused child abuse.¹⁶² However, a minority of participants wanted shorter custodial sentences because, as one participant explained, ‘there [is] a big difference between looking at an image and actually abusing a child’.¹⁶³

1.4.3 What the Public Knows about the Law – The Evidence

Within the scope of public perceptions research, studies examining what the public knows about the scope of CEM law are limited; both by their number, and by the fact that researchers use definitions of CEM that are considerably narrower than those in

¹⁵⁶ Daniel P Mears et al, ‘Sex Crimes, Children, and Pornography Public Views and Public Policy’ (2008) 54(4) *Crime & Delinquency* 532, 537.

¹⁵⁷ Ibid 552.

¹⁵⁸ Ibid 543.

¹⁵⁹ Ibid 547.

¹⁶⁰ Carol McNaughton Nicholls et al, ‘Attitudes to Sentencing Sexual Offences’ (United Kingdom Sentencing Council, 2012) <http://www.stopitnow-evaluation.co.uk/media/1019/attitudes_to_sentencing_sexual_offences.pdf> 1–6.

¹⁶¹ Ibid 94.

¹⁶² Ibid 40.

¹⁶³ Ibid.

legislation.¹⁶⁴ Nonetheless, where the behaviour involves material showing a real child, these studies tend to suggest knowledge is lower for the viewing of CEM, compared to other CEM offences.

For example, McCabe found that while over 90 per cent of participants knew it was a crime to distribute and possess such material,¹⁶⁵ significantly more than half the participants wrongly believed that ‘downloading child pornography from a newsgroup’ was legal (67.8%).¹⁶⁶ In their 2010 study Lam, Mitchell and Seto found that, although most participants knew that the distribution and possession of CEM depicting a real child was illegal,¹⁶⁷ a large proportion of participants were unsure of the illegality of viewing such material online, when it was not downloaded (44.8%).¹⁶⁸ A further seven per cent of participants thought it was legal to view material when it was not downloaded.¹⁶⁹

Other research perhaps suggests that levels of knowledge also vary depending on the type of material. While neither of the Australian studies directly examined knowledge, Prichard and colleagues noted that one in every 20 participants reported a ‘lack of knowledge of CEM and related behaviours’.¹⁷⁰ Adding to this, at the conclusion of their study, Liddell and Taylor stated that there was ‘a disjunction between public awareness and understanding of what constitutes child abuse material and child exploitation material’.¹⁷¹

Beyond Australia, Hitikasch, Merdian and Hogue found only slightly over half of the participants in their study thought it was illegal to read sexually explicit stories about children.¹⁷² And, adding another dimension, McCabe and Johnston found that more than three quarters of a convenience sample of 18–30-year-olds (N=120, males

¹⁶⁴ Lam, Mitchell and Seto, above n 140, 201 (*Study 2 Vignette*); Prichard et al, above n 2, 239.

¹⁶⁵ McCabe, above n 137, 75.

¹⁶⁶ Ibid.

¹⁶⁷ Lam, Mitchell and Seto, above n 140, 185.

¹⁶⁸ Ibid 188.

¹⁶⁹ Ibid 188–189.

¹⁷⁰ Prichard et al, above n 2, 235.

¹⁷¹ Liddell and Taylor, above n 2, 43.

¹⁷² Hitikasch, Merdian and Hogue, above n 143, 5.

51.7%) knew it was illegal for a 13-year-old to send self-generated images to others.¹⁷³

1.5 A BRIEF INTRODUCTION TO RESEARCHING PUBLIC PERCEPTIONS

Research into public perceptions is at the core of this thesis. While the method used to explore public perceptions is detailed in Chapter 7, here some brief introductory comments are made. As Gelb points out, researching public attitudes ranges from examining ‘enduring attitudes, firmly held beliefs, top-of-the-mind views, judgment based on experience and knowledge, [and] simply an answer created on the spot in order to fill out the questionnaire’.¹⁷⁴

Neatly articulating the principal distinction when studying public perceptions towards the criminal law, Ryberg and Roberts state that, ‘[t]he critical choice appears to lie between drawing upon raw, ‘uninformed’ views which are closer to population norms – or the opinions of an elite or informed sample of the public’.¹⁷⁵

Notably, scholars have observed that studies into public perceptions of one aspect of the criminal justice system, namely sentencing, indicate a substantial difference between ‘informed’ and ‘uninformed’ public perceptions.¹⁷⁶ As a result of such observation, the importance of exploring ‘informed’ public views has been emphasised.¹⁷⁷

¹⁷³ Kimberly A McCabe and Olivia C Johnston, ‘Perceptions on the Legality of Sexting: A Report’ (2014) 32(6) *Social Science Computer Review* 765, 767 (‘A 13-year-old male sends pictures of his genitals to several female classmates’ Legal 23.3%; Illegal 76.6%).

¹⁷⁴ Karen Gelb, ‘Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing’ (Sentencing Advisory Council, 2006) 8.

¹⁷⁵ Jesper Ryberg and Julian V Roberts, ‘Introduction: Exploring the Normative Significance of Public Opinion for State Punishment’ in Jesper Ryberg and Julian V Roberts (eds), *Popular Punishment: On the Normative Significance of Public Opinion* (Oxford University Press, 2014) 8.

¹⁷⁶ See for example, Kate Warner, ‘Sentencing Scholarship in Australia’ (2006) 18(2) *Current Issues in Criminal Justice* 241, 257; Austin Lovegrove, ‘Putting the offender back into sentencing: An empirical study of the public’s understanding of personal mitigation’ (2011) 11(1) *Criminology & Criminal Justice* 37, 55-56.

¹⁷⁷ *Ibid.*

Given this, it may seem anomalous that this study chooses to explore the uninformed views of participants – a cohort referred to as ‘digital natives’.¹⁷⁸ While the specific reasons for choosing this cohort are further detailed below (see 6.4), the reasoning underlying this choice can be simply stated.

It is the objective of this thesis to draw conclusions about how Australia’s public policy and legislative response can be improved to better prevent onset (see 1.6). To that end and informed by the arguments made in Chapter 3 and Chapter 4, it is insight into current population norms, rather than a possible ideal potential (i.e., were the public to be ‘informed’), that has the greatest utility.

1.6 RESEARCH AIMS

As examined above, recent Australian studies purport to have found evidence of a ‘disjuncture’ between the perceptions of some members of the Australian community and CEM law. While the evidence is limited, researchers speculate that the criminality of viewing CEM may not be widely appreciated in Australia. To better understand this purported disjuncture, this thesis has two empirical aims.

1. To gauge digital natives’ perceptions of the criminality of viewing a range of online material definable as CEM under Australian law, and identify key gaps in knowledge; and,
2. To explore digital natives’ own awareness of explanations for the effects of viewing material involving a real and a cartoon child on the *Viewer*, *Other Offenders*, *Society* and the *Child Victim*, and identify key gaps in awareness.

To provide context for these aims, this thesis considers public perceptions through the lens of criminological and legal theory, focusing on what the implications of findings might be for preventing someone from deliberately viewing CEM for the first time.¹⁷⁹ Informed by these findings, this thesis concludes by identifying the key areas where

¹⁷⁸ Marc Prensky, ‘Digital Natives, Digital Immigrants’ (2001) 9(5) *On the Horizon* 1, 2 (defining ‘digital natives’ as ‘native speakers of the digital language of computers, video games and the Internet’).

¹⁷⁹ Prichard, Watters and Spiranovic, above n 3, 587.

Australia's public policy and legislative response could be adjusted to better prevent onset.

1.7 THESIS OUTLINE

This thesis has seven chapters, including this chapter. This chapter now concludes by outlining the structure of this thesis.

Chapter 2 reviews explanations for criminalising the viewing of CEM, as advanced by key theorists. In doing so, this chapter proposes a framework through which to conceptualise explanations for the effect of viewing material involving a real and a virtual child. The framework consists of four Effect Categories: the *Viewer*, *Other Offenders*, *Society* and, where the material involves a real child, the *Child Victim*.

Introducing the first theoretical lens, Chapter 3 draws on key criminological concepts to examine the national policy architecture as it relates to CEM in Australia. A policy blind spot is identified, which manifests a weak point in the prevention armoury.

Drawing on the notion of the Opportunistic Offender, from Situational Crime Prevention theory, this chapter argues that under the current policy settings, Australia is missing an opportunity to reduce the likelihood of onset for some individuals. Existing public perceptions research is used to underline this argument.

In Chapter 4, the second theoretical lens is introduced. Key principles from legal theory are used to examine the relationship between the State and the citizen. Informed by existing public perceptions research, this chapter argues that the aforementioned policy blind spot suggests that the State is falling short of its duty to publicise the law and ensure citizens have fair warning of criminalisation.

Chapter 5 presents a study of four years of judicial sentencing remarks (N=57) from Tasmania and Victoria to examine whether this area of state action constitutes a possible exception to the argument made in the two preceding chapters. The study explores whether, beyond merely indicating the criminality of viewing CEM per se, judges' sentencing remarks contain normative messages about why the viewing of CEM is morally wrongful. In doing so, this chapter considers what the educative value of such remarks might be for the community, and what the implications of findings might be for the theoretical arguments made in this thesis.

Chapter 6 contains the core empirical research undertaken in this thesis into the knowledge and attitudes of digital natives (N=504). The first part of this chapter outlines and justifies the research method adopted to explore public perceptions in this thesis. This includes discussion of the survey instrument, the construction of the survey items and the steps taken to increase the quality of results. After describing the approach to data analysis, this chapter reports results for the quantitative and qualitative dimensions of this study. Offering new insights into public perceptions, this study reveals gaps in participants' knowledge of the law, with significant proportions of participants failing to identify the criminality of viewing prohibited material. Using the Effect Category framework proposed in Chapter 2, this study also reveals gaps in participants' awareness about the potential for the viewing of CEM to have an effect on a viewer, other offenders, society and the child victim who is depicted in the material. In discussing the findings of this study, this chapter contextualises these findings against the previous research and makes connections between the empirical findings and the literature reviewed in Chapter 2. This chapter concludes by identifying the limitations of this study.

Chapter 7 is the capstone of this thesis. This final chapter applies the new findings and insights from public perceptions, as reported and discussed in Chapter 6, to the two theoretical lenses that frame this thesis. The chapter first scrutinises the implications of key findings for the Opportunistic Offender, posing the question: *What do public perceptions reveal about preventing the Opportunistic Offender from onset?* Attention then shifts to examine the implications of key findings for the legal theory arguments asking the question: *What do public perceptions reveal about the duty of the State to publicise the law and give fair warning of criminalisation?* The penultimate part of this chapter takes the lessons learnt from the application of findings to theory to make recommendations to improve the prevention of onset within the current Australian context. These recommendations intersect public policy, legislation and judicial practice. The final part of this chapter draws the thesis to its conclusion, identifying critical areas for future research and reiterating the original and substantial contribution to knowledge that it makes.

CHAPTER 2: A REVIEW OF EXPLANATIONS OF CRIMINALISATION – THEORISING THE EFFECTS OF VIEWING

2.1 INTRODUCTION

This chapter presents a literature review of rationales for criminalising the viewing of CEM and virtual-CEM. At the outset, this undertaking presents a preliminary issue. This is whether, in undertaking this review, a wide net should be cast or whether a measure, or exclusionary standard, should be adopted.

Taking the latter course would necessitate normative consideration of what such a standard should be. As noted in the previous chapter, the objectives and scope of this thesis preclude original theoretical legal research on the rationales for criminalising the viewing of CEM.

Yet, the question of how convincing an explanation for criminalisation should be remains important. In part, this is an issue because to date much of the criticism directed at rationales for criminalisation turn on the lack of substantiating evidence, as discussed below. Further, and perhaps in greater part, it is an issue because a key limiting principle of criminalisation is that the State is bound by what legal philosophers call the ‘truth-constraint’, which instructs that in criminalising behaviour, the State should ‘get it right’.¹⁸⁰ The rhetoric of evidence-based policy has great appeal,¹⁸¹ making empirical evidence one of the clearest indicators of whether the State has ‘got it right’. Nevertheless, it is inevitable that criminalisation will often ‘go beyond’ the evidence.¹⁸² Empirical evidence emerges slowly, if at all.¹⁸³ It follows

¹⁸⁰ Simester and Von Hirsch, above n 4, 19.

¹⁸¹ Nick Tilley and Gloria Laycock, ‘Joining up Research, Policy and Practice about Crime’ (2000) 21(3) *Policy Studies* 213, 213 (observing that it has ‘all the appeal of motherhood and apple pie’); Marston and Watts, above n 48, 144–145.

¹⁸² Blumstein, above n 48, 461 (stating ‘in a field like criminal justice, where there are multiple objectives and a variety of important constraints, formulating intelligent policy choices must inevitably go beyond even the best available evidence’). See also Sandra Nutley, Huw Davies and Isabel Walter, ‘Evidence Based Policy and Practices: Cross Sector Lessons From the UK’ (ESRC UK Centre for Evidence Based Policy and Practice, 2002), 10 (describing the relationship between research and policy as loose, shifting and contingent’).

¹⁸³ Blumstein, above n 48, 461.

that a scarcity of empirical evidence does not necessarily mean an explanation is invalid.¹⁸⁴

Informed by this thinking, this review takes the former course, and casts a wide net to explore explanations for criminalisation. In doing so, this review groups explanations for criminalisation with reference to their effects, hereafter called ‘Effect Categories’. For CEM involving a real child, explanations for criminalisation are reviewed under four categories: the *Viewer*, *Other Offenders*, *Society* and the *Child Victim*. With the exception of the category of the *Child Victim*, these categories remain the same for virtual-CEM.

This review provides a frame within which to explore public awareness and map possible gaps between theorist and lay perceptions of the criminalisation of viewing material that involves a real and a virtual child. The intention in doing so is not to propose a normative measure of whether criminalisation is justified. This is a question for future doctrinal and theoretical legal research. Rather, this review provides a map by which to explore public perceptions of the rationales for criminalisation and identify where gaps in public awareness may lie. For the purpose of this thesis, this review is critical to the two empirical studies in Chapter 5 and Chapter 6 respectively.

For the content analysis of judicial sentencing remarks in Chapter 5, this review facilitates the assessment of the messages given by judges in such remarks. It provides a means by which to explore the similarities and differences between how judges and theorists explain the rationales for criminalisation. Turning to Chapter 6, which contains the substantive empirical study of public perceptions, this review enables exploration and discussion of whether the rationales for criminalisation put forward by theorists bear any resemblance to public perceptions. To foreshadow these later chapters, public perceptions are explored using two theoretical lenses. Chapter 3 applies a criminological lens to consider the implications of public perceptions for crime prevention, while Chapter 4 uses a legal theory lens to reflect on the significance of public perceptions for the relationship between the State and the citizen in common law jurisdictions. In turn, the final chapter of this thesis, Chapter 7,

¹⁸⁴ Natalia Hanley et al, ‘Improving the Law Reform Process: Opportunities for Empirical Qualitative Research’ (2016) 49(4) *Australian & New Zealand Journal of Criminology* 546, 546–563 (referring to the role of empirical evidence in the law reform process).

marries the key empirical findings with the theoretical arguments put forward in Chapter 3 and Chapter 4.

As a final preliminary point, this review uses the term ‘viewing’, despite the fact that many of the explanations reviewed below are put forward for the offence of possession rather than accessing per se. It does so on the basis that unless otherwise noted, from a theoretical perspective, viewing is the critical behaviour underlying both offences.¹⁸⁵

2.2 THE EFFECT OF VIEWING ON THE VIEWER

2.2.1 Viewing a Real Child and the Risk of Child Sexual Abuse

Where the viewing of CEM involves a real child, criminalisation is said to target, or reduce the risk of sexual offending against children. In most instances, the connection between child sexual abuse and CEM (involving a real child) is plain; as O’Donnell and Milner observe, ‘child pornography cannot be produced without a child being sexually abused’.¹⁸⁶ Yet, there is debate about whether the act of viewing is connected to child sexual abuse. Two arguments are made. The first associates the act of viewing with the incitement of child sexual abuse itself, while the other associates the viewing of CEM with the fostering of negative attitudes towards children, which in turn, make it easier for an individual to offend.¹⁸⁷

Yet, while commonly invoked in the policy context,¹⁸⁸ this explanation is criticised by theorists for turning on the existence of a link between viewing an image and an effect on behaviour that is too ‘slippery’¹⁸⁹ or even a ‘gross generalization’.¹⁹⁰ Indeed, the

¹⁸⁵ Gillespie, above n 50, 39 (noting the behaviours are ‘largely analogous’); Clough, above n 51, 233 (noting that the justifications for accessing are ‘essentially the as those used to justify the offence of ‘simple’ possession).

¹⁸⁶ Ian O’Donnell and Claire Milner, *Child Pornography: Crime, Computers and Society* (Willan Publishing, 2007) 69.

¹⁸⁷ Ibid 75.

¹⁸⁸ Alisdair A Gillespie, *Cybercrime: Key Issues and Debates* (Routledge, 2016) 230.

¹⁸⁹ Anne Higonnet, *Pictures of Innocence: The History and Crisis of Ideal Childhood* (Thames and Hudson, 1998) 163.

¹⁹⁰ Asaf Harduf, ‘Criminalization Downloads Evil: Re-examining the Approach to Electronic Possession when Child Pornography goes International’ (2016) 34 *Boston University International Law Journal* 279, 279, 300.

evidence has been characterised by theorists as, at best, ‘somewhat disparate’¹⁹¹ and ‘shaky’,¹⁹² and ‘not consistent’¹⁹³ at worst. Despite this, the prominence of this type of explanation warrants further examination.

There are two main claims. The first is that those who view CEM are contact offenders while the second is that those who view CEM will contact offend in the future. With respect to the former, studies reveal variation in the rates of CEM viewers who have a previous contact offence against a child: from 85 per cent¹⁹⁴ in one much criticised study,¹⁹⁵ to 33 per cent in another¹⁹⁶ and just one per cent in a further study.¹⁹⁷

Helping to explain this divergence, a recent meta-analysis found a marked difference between rates for studies that used official records such as past conviction (12.2%) and those that relied on self-reports by offenders (55%) suggesting that while unsettled, there is perhaps some limited basis for this claim.¹⁹⁸ Turning to the latter claim, the evidence suggests that generally, as Dervley and colleagues describe, internet CEM offenders have ‘more lifestyle and psychological boundaries preventing their progression to contact offending’.¹⁹⁹ Yet viewing CEM may elevate the risk that some individuals will engage in offences against children where there is an existing

¹⁹¹ Gillespie, above n 50, 36.

¹⁹² Carissa Byrne Hessick, ‘Questioning the Modern Criminal Justice Focus on Child Pornography Possession’ in Carissa Hessick (ed), *Redefining Child Pornography Law: Crime, Language, and Social Consequences* (University of Michigan Press, 2016) 153.

¹⁹³ Melissa Hamilton, ‘The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?’ (2011) 22(2) *Stanford Law and Policy Review* 545, 579.

¹⁹⁴ Michael L Bourke and Andres E Hernandez, ‘The “Butner Study” Redux: A Report of the Incidence of Hands on Child Victimization by Child Pornography Offenders’ (2009) 24 *Journal of Family Violence* 183, 187.

¹⁹⁵ Hessick, above n 192, 153.

¹⁹⁶ United States Department of Justice, ‘The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress’ (United States Government, 2010) 315 (for offenders sentenced between 1999–2000 31.4%; 2010 (33.9%) and the first quarter of 2012 (33.%)).

¹⁹⁷ Jérôme Endrass et al, ‘The Consumption of Internet Child Pornography and Violent and Sex Offending’ (2009) 9 *BMC Psychiatry* 43, 46.

¹⁹⁸ Michael Seto, Karl Hanson and Kelly M Babchishin, ‘Contact Sexual Offending by Men with Online Sexual Offenses’ (2011) 23(1) *Sexual Abuse* 124, 125–140.

¹⁹⁹ Rebekah Dervley et al, ‘Themes in Participant Feedback on a Risk Reduction Programme for Child Sexual Exploitation Material Offenders’ (2017) 23(1) *Journal of Sexual Aggression* 46, 47.

predisposition towards aggressive sexual behaviours. This is described as the idea that there is a ‘tipping-point effect’ — where, if other risk factors are present:

obtaining sexual gratification through the use of child pornography is a risk factor for other sex offending against minors because child pornography may strengthen existing tendencies.²⁰⁰

In other words, continued viewing might elevate ‘intensity of interest [which] may drive a motive for contact offence’.²⁰¹ While Australian research is limited, in 2017, Krone and Smith examined a convenience sample of 152 individuals investigated for contravention of the federal CEM offence provisions, finding that 86 per cent of the sample was CEM-only offenders,²⁰² and only a small proportion of the sample had a prior or post criminal history for offences against a child.²⁰³ That said, and as the researchers acknowledge, these incidences are unlikely to reflect actual offending rates, as investigative and prosecutorial decisions will have shaped the sample.²⁰⁴

Returning to the related explanation identified above, critics state that it expresses ‘anachronistic notions of “moral corruption”’²⁰⁵ that erroneously suggest ‘simple solutions’ to a complex issue.²⁰⁶ It has also been suggested that for some individuals, contrary to inciting child sexual abuse, viewing CEM might play a role in preventing it,²⁰⁷ although the value of this proposition is questioned.²⁰⁸

²⁰⁰ United States Department of Justice, above n 196, 312.

²⁰¹ J Sullivan, ‘The Spiral of Sexual Abuse: A Conceptual Framework for Understanding and Illustrating the Evolution of Sexually Abusive Behaviour’ (2002) 41 *NOTA News* 17, 17–21.

²⁰² Krone et al, above n 95, 6.

²⁰³ Ibid 8.

²⁰⁴ Ibid.

²⁰⁵ Robert J Danay, ‘The Danger of Fighting Monsters: Addressing the Hidden Harms of Child Pornography Law’ (2005) 11(1) *Review of Constitutional Studies* 151, 189.

²⁰⁶ Ibid 189; Bruce Ryder, ‘The Harms of Child Pornography Law’ (2003) 36(1) *UBC Law Review* 101, 121.

²⁰⁷ Max Taylor and Ethel Quayle, *Child Pornography: An Internet Crime* (Brunner-Routledge, 2003) 90.

²⁰⁸ Gillespie, above n 50, 41; Michael C Seto, *Pedophilia and Sexual Offending Against Children: Theory, Assessment, and Intervention* (American Psychological Association, 2008) 68.

2.2.2 Viewing a Virtual Child and the Risk of Child Sexual Abuse

The risk of child sexual abuse is also raised where the material involves a virtual child. Explaining the core concern, Akdeniz identifies that the issue is that someone who views such material ‘will end up abusing children at some stage, so the purpose of [criminalising such material] may be seen as a preparatory act being criminalized: the prevention of child abuse’.²⁰⁹

This explanation also attracts criticism.²¹⁰ For example, expressing disapproval of what she describes as the ‘moral crusade’ of the United States government against such material,²¹¹ April maligns the position of the United States government on the basis that they offer no proof that ‘virtual child pornography leads to the actual abuse of children’.²¹²

Characterising this type of explanation as a ‘moral corruption’ argument, Ryder also criticises the notion that there is a causal relationship between an individual’s exposure to a ‘representation of crime’, the corruption of their morals and the incitement of criminal behaviour.²¹³ According to Ryder, the appeal of this type of explanation ‘lies, not in its rationality, but in its promise of simple solutions to disturbing and complex social problems’ including child sexual abuse.²¹⁴

As such, Ryder asserts that virtual-CEM (imaginary representations) that does not amount to ‘hate propaganda’²¹⁵ should be struck from the remit of the criminal law, as

²⁰⁹ Yaman Akdeniz, *Internet Child Pornography and the Law: National and International Responses* (Ashgate, 2008) 22.

²¹⁰ Eneman, Gillespie and Stahl, above n 81, 4.2; Katherine S Williams, ‘Child Pornography Law: Does it Protect Children’ (2004) 26(2) *The Journal of Social Welfare and Family Law* 245, 252–253 (stating ‘[i]f politicians and judges were worried that paedophiles might be so sexually aroused by such pictures as to attack other children, or have their inhibitions removed so that such attacks would be possible, there should have been consideration as to whether this would/might/was likely to happen’).

²¹¹ Keisha April, ‘Cartoons Aren’t Real People, Too: Does the Regulation of Virtual Child Pornography Violate the First Amendment and Criminalize Subversive Thought?’ (2012) 19(1) *Cardozo Journal of Law & Gender* 241, 263.

²¹² Ibid 261.

²¹³ Ryder, above n 206, 118 (that is, ‘a person’s morals will be corrupted and criminal behaviour induced by exposure to representations of crime’).

²¹⁴ Ibid 121.

²¹⁵ Ibid 116 (meaning essentially ‘material that advocates or counsel the commission of acts harmful to children and youth’).

there is ‘no rational basis’ for expecting exposure to such material to be ‘more dangerous than exposure to representations of murder and mutilation’.²¹⁶

As a final point, there is a lack of theorising about whether viewing virtual-CEM prompts someone to look for CEM involving a real child. Theorists appear to dismiss this idea on the basis that it remains ‘unproven’.²¹⁷

2.2.3 Viewing a Real Child or a Virtual Child and the Risk of Grooming

The second explanation turns on the risk that CEM involving a real child will be used to ‘facilitate the seduction of new victims’,²¹⁸ that is, grooming a child by normalising the behaviour depicted or described.²¹⁹ While also based on risk, this explanation requires material to be viewed *and* for control to be exercised over it — a further act is required beyond the act of accessing or viewing the material.²²⁰ As Hessick describes, this explanation is predicated on the idea that:

If paedophiles did not have access to pornographic images of children ... then they [would be] less likely to succeed in their future attempts to convince minors to engage in sexual contact with them.²²¹

In other words, criminalisation is explicable on the basis that CEM is ‘a tool for tomorrow’s molestation’.²²² This explanation has greatest traction where the material involves a real child, although it is also advanced where the material involves a virtual child.²²³ Yet it is challenged for both types of material. Levy, among others, argues

²¹⁶ Ibid 121. That said, in Australia at least, the scope of criminalisation covers material depicting a child as the victim of ‘torture, cruelty or physical abuse’ see, eg, *Criminal Code 1995* (Cth) s 473.1.

²¹⁷ Gillespie, above n 50, 111.

²¹⁸ R P Tyler and Lore E Stone, ‘Child Pornography: Perpetuating the Sexual Victimization of Children’ (1985) 9(3) *Child Abuse & Neglect* 313, 316.

²¹⁹ Suzanne Ost, ‘Children at Risk: Legal and Societal Perceptions of the Potential Threat That the Possession of Child Pornography Poses to Society’ (2002) 29(3) *Journal of Law and Society* 436, 448; Susan Edwards, ‘Prosecuting “Child Pornography”’: Possession and Taking of Indecent Photographs of Children’ (2001) 22(1) *Journal of Social Welfare and Family Law* 1, 22; Tim Tate, *Child Pornography: An Investigation* (Trafalgar Square, 1990) 23–26; Jean Renvoize, *Innocence Destroyed: Study of Child Sexual Abuse* (Taylor & Francis, 1993) 212; Tyler and Stone, above n 218, 316.

²²⁰ Harduf, above n 190, 300.

²²¹ Carissa Byrne Hessick, ‘Disentangling Child Pornography From Child Sex Abuse’ (2011) 88 *Washington University Law Review* 853, 871; Higonnet, above n 189, 178.

²²² Higonnet, above n 189, 185.

²²³ See, eg, Ethel Quayle and Max Taylor, ‘Paedophiles, Pornography and the Internet: Assessment Issues’ (2002) 32 *British Journal of Social Work* 863, 866; David P Shouvin, ‘Preventing the Sexual

that even if exposure to CEM involving a real child makes another child ‘slightly more compliant’ to the sexual advances of an individual it is improbable that it has ‘ever made the crucial difference, in the absence of which a child would have escaped abuse’.²²⁴ This explanation is perceived as even more improbable where the material involves a virtual child. Levy states:

In the absence of much stronger, and I suspect unattainable, evidence that child pornography [involving a real child] makes a real difference to the ability of pedophiles to satisfy their desires, I suggest we have little reason to ban virtual pornography on this basis.²²⁵

Another common criticism is, as Higonnet argues, that criminalisation should focus on the *action* (the grooming) rather than controlling a tool that *may* be used to realise this action.²²⁶ Where this explanation is applied to the criminalisation of virtual images, the risk is characterised as merely the risk that images ‘might be misused’.²²⁷ It is often observed that there is a vast array of otherwise innocent items that could be used to groom a child (e.g., lollies).²²⁸ Countering this, it is pointed out that the ‘moral character’ of virtual-CEM is very different to say, lollies, which makes it ‘easier’ to explain why the former should be criminalised.²²⁹ Arguments that turn on morality are further examined below (see, 2.4).

2.3 THE EFFECT OF VIEWING ON OTHER OFFENDERS

2.3.1 *Viewing a Real Child and the Market*

The main causative explanation for criminalisation turns on what is termed the market dynamic.²³⁰ Described as ‘the most reasonable’²³¹ explanation, this dynamic has

Exploitation of Children: A Model Act’ (1981) 17 *Wake Forest Law Review* 535, 544; Janis Wolak, David Finkelhor and Kimberly Mitchell, ‘Child Pornography Possessors: Trends in Offender and Case Characteristics’ (2011) 23(1) *Sex Abuse* 22, 23; Krone, above n 89, 5.

²²⁴ Neil Levy, ‘Virtual Child Pornography: The Eroticization of Inequality’ (2002) 4(4) *Ethics and Information Technology* 319, 320; Harduf, above n 190, 301.

²²⁵ Levy, above n 224, 320.

²²⁶ Higonnet, above n 189, 178.

²²⁷ Eneman, Gillespie and Stahl, above n 81, 4.1.

²²⁸ *Ashcroft v Free Speech Coalition* 535 U.S. 234 (2002) [251] (Kennedy J).

²²⁹ Eneman, Gillespie and Stahl, above n 81, 4.1.

²³⁰ Harduf, above n 190, 296.

²³¹ Danay, above n 205, 191.

attracted various labels including the ‘Market-Reduction Argument’,²³² the ‘Fuel Argument’²³³ and ‘Market Deterrence Theory’.²³⁴ Despite this, the explanation of the underlying dynamic is essentially the same: the behaviour of the viewer triggers other offenders (i.e., abusers, producers and distributors) to exploit and abuse children. Yet, theorists are divided on the condition by which this dynamic is triggered, or, expressed another way, when the behaviour of the viewer will constitute a sufficient ‘signal of demand’ to incentivise other offenders to act.²³⁵ Put simply, there are two schools of thought which reflect respectively a broad and a narrow view of how this dynamic is triggered.

Representing the former, Ost — among others — argues that while it cannot be clearly established that viewing²³⁶ CEM plays a *direct* causative role in the likelihood that an individual will commit child sexual abuse, it may do so *indirectly* — that is, by ‘encouraging the occurrence of child sexual abuse that forms the content of child pornography’.²³⁷ Providing a useful practical example, Jenkins explains how requests for material that did not yet exist were common on ‘pedo boards’ with such material likely to ‘come onto the market in a few months or years, once pornographers know there is a market for such items’.²³⁸

According to Ost, the *reduction* aspect of this explanation rests on the ‘standard economic premise’ that criminalising behaviour diminishes a market.²³⁹ That is, that criminalisation means that fewer individuals will be willing to ‘risk breaking the law’

²³² Suzanne Ost, *Child Pornography and Sexual Grooming: Legal and Societal Responses* (Cambridge University Press, 2009) 113.

²³³ Gillespie, above n 50, 37.

²³⁴ Harduf, above n 190, 296.

²³⁵ Ibid.

²³⁶ Note: Ost confines her explanation to possession, with knowledge deriving from awareness of the record of the number of downloads of the material. It is however arguable, on this logic, that her explanation also applies to accessing, where the other offender derives knowledge from the record of the number of view counts.

²³⁷ Ost, above n 232, 113.

²³⁸ Jenkins, above n 10, 85–86 (providing an example, Jenkin’s notes that the following request was made: ‘Does any-one know where I can get movies of 8 to 12yr girls being raped? Not hurt, just being forcibly de-flowed?’).

²³⁹ Ost, above n 232, 113 (namely, that ‘rendering an activity unlawful, and, therefore increasing the costs to an individual who engages in it will normally lead to a reduction in demand for the product required for the individual to act in this way’).

to view the material and therefore ‘producers will have fewer people to “sell” their product to’.²⁴⁰ It is the use of the word ‘sell’ that attracts the most debate, as neither Ost, nor the other theorists who ascribe to this school of thought, confine their explanations to circumstances where a monetary payment takes place.²⁴¹ Instead, a number of conditions, in addition to monetary payment, are identified. For example, in the 1980s Stone pointed out that while profit may well take the form of money, ‘often the profit is in the form of new and different child pornography materials’.²⁴²

More recently, Ost and others have pointed to behaviour validation and status acquisition as incentives,²⁴³ while Roos characterises the relevant incentive as ‘voyeuristic gratification’.²⁴⁴ According to this school of thought, this dynamic ‘holds true’ under these conditions, provided that other offenders have knowledge that other individuals want to view the material.²⁴⁵

However, embodying the narrow view, Harduf argues that where CEM is acquired without a monetary transaction between a producer and a downloader (and arguably a viewer) there is a ‘major gap in the causal chain’.²⁴⁶ Characterising this gap as a ‘normative link’, Harduf argues that in this circumstance the connection between the behaviour of the downloader — let alone someone who simply views the material — is ‘tenuous’.²⁴⁷ Others use even stronger language. For example, Mirkin states that

²⁴⁰ Ibid 113.

²⁴¹ Ost, above n 219, 452; Higonnet, above n 189, 179–80. That said, no one denies that a commercial market exists. See, eg, Internet Watch Foundation, ‘Annual Report 2015’ (Internet Watch Foundation, 2015) <<https://www.iwf.org.uk/assets/media/annual-reports/IWF%202015%20Annual%20Report%20Final%20for%20web.pdf>> 19 (reporting that while there are ‘fluctuations’ in the amount of commercially available CEM, in 2015 they found that of 68,092 webpages that they confirmed as containing CEM, 14,708 (21%) were commercial); International Centre for Missing and Exploited Children, ‘Annual Report 2016’ (ICMEC, 2016) <<https://indd.adobe.com/view/5dbf22bc-4a2e-41cd-af08-6825dacbb547>> 16 (noting that there is some indication that the commercial market may be contracting).

²⁴² Tyler and Stone, above n 218, 315.

²⁴³ See, eg, Ost, above n 232, 113; Jenkins, above n 10, 91; Taylor and Quayle, above n 207, 132.

²⁴⁴ Hanna Roos, ‘Trading the Sexual Children: Child Pornography and the Commodification of Children in Society’ (2014) 23(2) *Texas Journal of Women and the Law* 131, 150.

²⁴⁵ Ost, above n 219, 453.

²⁴⁶ Harduf, above n 190, 296.

²⁴⁷ Ibid 297.

such a link is no more than a ‘convenience argument’²⁴⁸ that must be rejected outright where the material is free.²⁴⁹ Going further, Harduf argues that even if another offender (e.g., a producer) had knowledge that others wanted to view their material, unless this was monetised, the presence of this condition is unlikely to ‘offset’ the risk that engaging in child sexual abuse represents (e.g., criminal penalties).²⁵⁰ In other words, it might be a *motivating* condition, but it is not a *sufficient* condition.²⁵¹

Others take a more pragmatic perspective. For example, Dillof asserts that, even where the knowledge condition is present (e.g., where an offender knows the material is being accessed through a P2P network) knowledge alone is unlikely to trigger action as the supply of CEM is already sufficient to satisfy the ‘demands of most offenders’.²⁵² According to this account, the rules of supply and demand that ‘undergird markets and drive production’ simply do not apply, not least because, as Dillof comments, ‘digital images can be reproduced endlessly and costlessly [and] stock is never deleted’.²⁵³ Hessick makes a similar observation, stating that use of the market dynamic is problematic because ‘the so-called child pornography market does not function as a commercial market’.²⁵⁴

As a further point, Tyler has observed that the behaviour of some individuals who use the ‘free market’ might be enabled by the initial purchase of the material by others who subsequently make it freely available.²⁵⁵ The gist of this explanation is that irrespective of whether material has been paid for, the mere possession of material

²⁴⁸ Harris Mirkin, ‘The Social, Political, and Legal Construction of the Concept of Child Pornography’ (2009) 56(2) *Journal of Homosexuality* 233, 259.

²⁴⁹ Ibid.

²⁵⁰ Harduf, above n 190, 297.

²⁵¹ Ost, above n 219, 453.

²⁵² Anthony M Dillof, ‘Possession, Child Pornography and Proportionality: Criminal Liability for Aggregate Harm Offenses’ (2016) *Wayne State University Law School Legal Studies Research Paper Series* 1, 23.

²⁵³ Ibid.

²⁵⁴ Hessick, above n 192, 152.

²⁵⁵ Tyler and Stone, above n 218, 315 (noting in the 1980s that ‘commercial child pornography could not be produced without the many child molesters/pornographers supplying original material for publication and/or duplication’).

(and arguably, the mere accessing) makes an individual ‘a cog in the vast machinery that sexually abuses and exploits children through child pornography’.²⁵⁶

Yet, even if this is the case, the impact of one individual downloading CEM in this circumstance — let alone merely viewing it online — is unlikely to be, or as Dillof asserts ‘cannot be’, very ‘significant’.²⁵⁷

2.3.2 Viewing a Virtual Child and the Market

A market explanation is also used to explain the criminalisation of material involving a virtual child, albeit in a different form. For virtual CEM, market explanations focus on how such behaviour helps, or aids the market for CEM involving a real child. For example, Wasserman argues that allowing the possession of material involving a virtual child, at least when paid for:

would help maintain the child pornography market which would leave open the financial conduit by which the creation of all child pornography is funded and would lead to an increased risk that real children would be violated.²⁵⁸

Conversely, although more controversially, it is contended that criminalising virtual material counters the depreciating effect its existence could otherwise have on the market for material involving a real child. Levy explains:

allowing virtual porn will reduce the amount of harm to actual children, by providing an acceptable outlet for dangerous desire, and by encouraging pornographers to seek alternatives to real children.²⁵⁹

Making a similar point, Cisneros observes that this kind of material might ‘shield’ real children from abuse on the basis that ‘paedophiles could use this alternative

²⁵⁶ Paul G Cassell, James R Marsh and Jeremy M Christiansen, “‘Not Just’ Kiddie Porn: The Significant Harms from Child Pornography Possession’ in Carissa Byrne Hessick (ed), *Refining Child Pornography Law: Crime, Language, and Social Consequences* (University of Michigan Press, 2016) 190.

²⁵⁷ Dillof, above n 252, 23.

²⁵⁸ Adam J Wasserman, ‘Note: Virtual.child.porn.com: Defending the Constitutionality of the Criminalization of Child Pornography by the Child Pornography Prevention Act of 1996 – A Reply to Professor Burke and Other Critics’ (1998) 35 *Harvard Journal on Legislation* 245, 270.

²⁵⁹ Levy, above n 224, 321; Akdeniz, above n 209, 23 (stating ‘[t]he making available of pseudo-photographs could in theory restrict prosecutors in their ability to obtain convictions because it could be impossible to prove that the content in question was produced using real children.’)

source to fulfil their desires’.²⁶⁰ Criticising this proposition, Gillespie observes, this explanation assumes ‘offenders gain equal stimulation from virtual and real child pornography’.²⁶¹ This assumption has been queried as it rests on the mistaken notion that material involving a real and a virtual child is indistinguishable, albeit that this may become a reality in the future.²⁶² Yet, and perhaps providing some indication of the appeal of such material more generally, Mains observes that since the decision in *Ashcroft v Free Speech Coalition* 535 U.S. 234 (2002) which excluded ‘computer-generated’ (or virtual-CEM) from the First Amendment protection afforded to material depicting a real child, there has been an ‘explosion’ in the amount of virtual-CEM created in the United States.²⁶³

2.4 THE EFFECT OF VIEWING ON SOCIETY

2.4.1 *Viewing a Real Child and Morality*

As a general comment, when explanations for criminalisation explicitly reference morality they often attract criticism; indeed, Gillespie points out that such arguments are, when made for CEM, ‘perhaps the most controversial’.²⁶⁴ Despite this, theorists use explanations that rest on an assertion that CEM offending poses a threat to

²⁶⁰ Dannielle Cisneros, ‘“Virtual Child” Pornography on the Internet: A “Virtual” Victim?’ (2002) 19 *The Law and Technology Review* 1, 5.

²⁶¹ Gillespie, above n 50, 111.

²⁶² Ibid 112; Clough, above n 104, 271; Cf Paul T Backer, ‘Stamping Out Icons: A Legal Analysis on How to Legislate Against Virtual Child Pornography Without Trampling Over the First Amendment’ (2007) 8 *Hinckley Journal of Politics* 59. See further Hany Farid and Mary J Bravo, ‘Perceptual Discrimination of Computer Generated and Photographic Faces’ (2012) 8(3) *Digital Investigation* 226–235 (examining the reliability of observers to determine that an image is a photograph rather than a computer generated image. Judgments that an image was a photograph were 85% reliable for colour images with medium resolution, and high quality).

²⁶³ Benjamin A Mains, ‘Virtual Child Pornography, Pandering, and the First Amendment: How Developments in Technology and Shifting First Amendment Jurisprudence Have Affected the Criminalization of Child Pornography’ (2010) 37(4) *Hastings Constitutional Law Quarterly* 809, 827.

²⁶⁴ Gillespie, above n 50, 38–39. See also Ryder, above n 206, 135 (‘[t]o justify criminal prohibitions, we need a reason other than our dislike of the ideas expressed’); Williams, above n 201, 254 (arguing that ‘[a]t the least, it seems that, except for the original abuse of children, the danger to children has not been proven. Therefore the reasoning for the law must fall back on the protection of sexual morality; the desire to prevent people obtaining sexual gratification, even if it does not interfere with the rights of children (especially in the case of pseudo-images, where children are not used or abused in the creation of the image), merely because most people consider that viewing such images is abhorrent’).

‘morality’.²⁶⁵ Two forms of explanation are given closer attention here, as both relate to the protection of the child, an explanation that undergirds many of the other explanations discussed in this chapter.²⁶⁶ To balance this discussion, attention is also given to rights based arguments, which are advanced to limit the scope of criminalisation.

Using the language of morality, in early works, Ost argued that criminalising the possession of CEM was necessary to ensure ‘the moral value in society which ascribes protective status to the child’ is not jeopardised.²⁶⁷ In later works, however, Ost re-examined this argument and ultimately rejected ‘moral constructions’ of the harms of CEM thereby illuminating the incumbent difficulties. The basis for this rejection was that predicating criminalisation on ‘public morals’²⁶⁸ made it ‘very difficult to adopt an objective, rational and proportionate response’.²⁶⁹ Reflecting on this, Ost states ‘we have reached a point where any behaviour that is connected to any form of child pornography is automatically considered to be harmful’.²⁷⁰

An observation by Rogers and Rogers offers further insight into why, despite questioning within the literature, the protection of children remains central. Namely, that any attempt to question the protectionist discourse with respect to children is an endeavour likely to result in accusations or labelling as an ‘apologist for the paedophile lobby’.²⁷¹

As an aside, such concern might also provide some explanation of why risk-based explanations (see, 2.2) remain a ‘more general factor’ referenced to explain the criminalisation of the viewing of CEM.²⁷² In other words, ultimately, the perception

²⁶⁵ Ost, above n 219, 437 (observing ‘there appears to be an acceptance of the possibility that the availability of child pornography is harmful to society because it has a corrupting effect upon the general morality’); Gillespie, above n 50, 43 (as Gillespie puts it, that the criminalisation of material is ‘justified on the basis of morality’).

²⁶⁶ Ost, above n 232, 122 (pointing out that the concept of ‘harm’ is a moral concept).

²⁶⁷ Ost, above n 219, 443.

²⁶⁸ Ost, above n 232, 122.

²⁶⁹ Ibid.

²⁷⁰ Suzanne Ost, ‘Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality’ (2010) 30(2) *Legal Studies*, 232; Ost, above n 232, 10–11.

²⁷¹ Wendy Stainton Rogers and Rex Stainton Rogers, ‘What is Good and Bad Sex for Children?’ in Michael King (ed), *Moral Agendas for Children’s Welfare* (Routledge, 1999) 179.

²⁷² Gillespie, above n 50, 37.

that criminalisation may protect children in some way outweighs concern about the reality of this potential, and the costs associated with doing so.²⁷³ This is characterised as the precautionary response, namely that:

Given the importance of this issue and in the absence of definitive knowledge, for practical purposes prudence suggests we must err on the side of caution and assume the balance lies in terms of the dangers of fantasy becoming reality.²⁷⁴

Even so, questions are raised about whether criminalisation is more about enhancing feelings of ‘moral rectitude’ and ‘moral order’ within society, than protecting children.²⁷⁵ In the literature, the most sustained and reasoned criticism comes from Adler, although other commentators make similar arguments.²⁷⁶ Adler argues that the criminalisation of CEM fails to realise the goal of protecting children and instead, such laws ‘threaten to reinforce the very problem they attack’.²⁷⁷ The critical premise of Adler’s explanation is that the criminalisation of CEM has had a ‘perverse’ consequence, as it ‘explicitly requires us to take on the gaze of the pedophile in order to root out pictures of children that harbour secret pedophile appeal’.²⁷⁸

Danay advances a similar explanation in a sentencing context, stating that increases in sentencing for CEM offending may ‘actually serve to intensify our society’s current obsession with sexualised children, and thereby reinforce the very blight the law is attempting to eradicate’.²⁷⁹

²⁷³ Higonet, above n 189, 187 (stating ‘of course everyone wants to catch child molesters, and to err on the side of caution. Weighted against each other, the safety of one child feels more imperative than the comfort of [individuals suspected of CEM consumption] no matter how innocent they might be. The adults will probably recover, especially if they are innocent, while the child might be irrevocably damaged’).

²⁷⁴ Taylor and Quayle, above n 207, 195.

²⁷⁵ Mirkin, above n 248, 260.

²⁷⁶ Higonet, above n 189, 7.

²⁷⁷ Amy Adler, ‘The Perverse Law of Child Pornography’ (2001) *Columbia Law Review* 209, 201; Ost, above n 219, 460 (pointing out that ‘society’s desire to shield children by upholding the dominant construction of childhood innocence may effectively be placing children at greater risk of harm from those who find the idea of innocence attractive’).

²⁷⁸ Adler, above n 277, 213; Krone, above n 74, 4.

²⁷⁹ Danay, above n 205, 153.

These theorists do not reach the conclusion that ultimately the ‘costs’ of criminalisation outweigh the potential benefits (of criminalisation).²⁸⁰ Adler concludes that it is ‘better to have proliferating discourses about the danger of child exploitation than to have the exploitation itself’.²⁸¹ Even so, concerns about the scope and operation of such laws persist.²⁸²

There is also a question about where a line should be drawn, which, in the interests of simplicity, will be referred to as the non-tolerance argument. This argument turns on the notion that to *not* criminalise all forms of behaviour associated with CEM is an expression of tolerance towards child sexual abuse. Higonnet asserts that tolerance of CEM and associated behaviour ‘lends legitimacy to paedophilia in general’²⁸³ — albeit that neither paedophilia, nor identification as a paedophile, is criminalised.²⁸⁴ Ost provides a similar explanation stating that a ‘legitimizing force’ underlying the criminalisation of possession of CEM is that it may, among other things, ‘reinforce ... the fact that our society will not tolerate child sexual abuse’.²⁸⁵

A further idea put forward in this context is that to fully realise the goal of protecting children, law enforcement agencies must have the latitude to tackle all manifestations of behaviour involving CEM. For example, Ost points out that this explanation provides a ‘powerful justification’ for criminalising the possession of CEM, stating that ‘[w]hilst child pornography may not be an ever present feature of child sexual abuse, the law surrounding child pornography does enable the police to successfully tackle one aspect of child sexual abuse’.²⁸⁶ And, commenting on both the United States and Australian context, Clough notes that ‘facilitating prosecutions’ has been

²⁸⁰ Adler, above n 277, 213 (asserting that the criminalisation of CEM has ‘substantial social benefits’); Danay, above n 205, 191.

²⁸¹ Adler, above n 277, 272; Danay, above n 205, 191.

²⁸² See generally Thomas Crofts and Murray Lee, ‘“Sexting”, Children and Child Pornography’ (2013) 35 *Sydney Law Review* 85; Thomas Crofts et al, *Sexting and Young People* (Palgrave Macmillan, 2015); Mark J McLelland and Seunghyun Yoo, ‘The International Yaoi Boys’ Love Fandom and the Regulation of Virtual Child Pornography: The Implications of Current Legislation’ (2007) 4(1) *Sexuality Research and Social Policy* 93.

²⁸³ Higonnet, above n 189, 178.

²⁸⁴ Gillespie, above n 50, 33.

²⁸⁵ Ost, above n 219, 459.

²⁸⁶ *Ibid* 460.

used to justify expanding the definition of ‘child’ under CEM law to make it easier for law enforcement agencies in ‘borderline cases’.²⁸⁷

The other source of explanation in this context is feminist discourse. While concern over the commodification of children in CEM is not new,²⁸⁸ its description as a ‘feminist issue’ is more recent.²⁸⁹ Explanations within this area build on the feminist perspective on adult pornography. MacKinnon famously argued that ‘[p]ornography, in the feminist view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality’.²⁹⁰

While there are differences in the way feminist scholars perceive the issue of pornography, there is, as Smart observes, broad agreement about ‘[the] idea that pornography eroticizes domination and power differentiation’.²⁹¹ Drawing on this perspective Ost argues that:

the fantasies of the child pornographer, which include representations of children as exploitable sexual objects, are communicated to a receptive audience of child sexual abusers, representations that are willingly accepted by this audience.²⁹²

Similarly, Roos argues that CEM sexualises the ‘powerlessness’ of a child and commodifies ‘victimhood’.²⁹³ The act of possession, search, click and *download* — and arguably *access* — undermines the ‘asexual child-adult relationship’.²⁹⁴ Roos contends that this act constitutes a ‘direct or affirmative’ assault on this relationship,

²⁸⁷ Jonathan Clough, ‘Lawful Acts, Unlawful Images: The Problematic Definition of “Child Pornography”’ (2008) 38(3) *Monash University Law Review* 213, 241.

²⁸⁸ Judith Levine, *Harmful to Minors: The Perils of Protecting Children from Sex* (University of Minnesota Press, 2002) 4 (‘[w]e have arrived at a global capitalist economy that, despite all our tasking, finds sex exceedingly marketable and in which children and teens serve as both sexual commodities (JonBenet Ramsey, Thai child prostitutes) and consumers of sexual commodities (Barbie dolls, Britney Spears’).

²⁸⁹ Abigail Bray, ‘Merciless Doctrine: Child Pornography, Censorship, and Late Capitalism’ (2011) 37(1) *Signs: Journal of Women in Culture and Society* 133, 154.

²⁹⁰ Catharine A MacKinnon, *Towards A Feminist Theory of The State* (Harvard University Press, 1989) 197.

²⁹¹ Carol Smart, *Feminisms and the Power of Law* (Routledge, 2002) 117.

²⁹² Ost, above n 219, 454 (although see, 3.4.2. about the varying motivations for CEM offending).

²⁹³ Roos, above n 244, 156.

²⁹⁴ *Ibid.*

characterising it as ‘an overt attempt to undo the barrier that society and the law have constructed between children and sex for one’s sexual gratification’.²⁹⁵

Overlapping with mainstream concern about the presentation and construction of children as sexual commodities within popular culture,²⁹⁶ both Ost and Roos contend that tackling the commodification of children through CEM is vital. For Ost, this turns on the possibility that CEM ‘encourages’²⁹⁷ or ‘promote[s] a perception of children as being submissive objects who can be used for sexual exploitation’.²⁹⁸ While for Roos, the issue is the contention that to do otherwise would ‘implicitly condon[e] a creeping in of other types of child sexualization’.²⁹⁹

Adding a further layer, rights based arguments are used in an attempt to limit the scope of criminalisation for CEM, although they are largely unsuccessful for CEM involving a real child. Jenkins observes that although other forms of deviant behaviour have ‘reputable defenders or at least libertarians who assert that it should not be severely penalised’, for CEM there is ‘no such tolerance, no minoritarian school that upholds the rights of individuals to pursue their private pleasures’.³⁰⁰

Even in the United States, which has a constitutionally enshrined right to freedom of speech, CEM involving a real child is excluded from the mantle of protection provided by this right.³⁰¹ Although this position attracts criticism, opponents focus on the scope of the right itself rather than a defence of the right to view CEM per se. For instance, employing a floodgate argument, Quigley maligns this position for creating a situation in which ‘it is arguable that a state can decide to prohibit the private

²⁹⁵ Ibid 149.

²⁹⁶ Melinda Tankard Reist and Noni Hazlehurst, *Getting Real: Challenging the Sexualisation of Girls* (Spinifex Press, 2010); Harduf, above n 190, 308 (pointing out that such harm is not caused exclusively by CEM, but rather that it is only part of the problem and other ‘aspects’ should be addressed as well).

²⁹⁷ Ost, above n 219, 453.

²⁹⁸ Ibid 455.

²⁹⁹ Roos, above n 244, 151.

³⁰⁰ Jenkins, above n 10, 4.

³⁰¹ *Ashcroft v Free Speech Coalition* 535 U.S. 234 (2002).

possession of a book on the use of firearms on the theory that the reader might use the book to learn about guns and commit a crime'.³⁰²

By framing the issue in this way, Quigley sets up the argument as being about a 'basic right of the individual' to possess material, irrespective of its content.³⁰³ In Australia, the absence of an equivalent constitutional guarantee to free speech,³⁰⁴ or other similarly expansive right,³⁰⁵ means that similar arguments, while proposed, lack momentum.³⁰⁶ Even so, the nature of the debate changes for virtual-CEM, as discussed below.

2.4.2 Viewing a Virtual Child and Morality

The validity of morality as a basis for criminalisation is strongly criticised for virtual-CEM. According to Simpson, criminalising material that does not involve a real child is 'based on an ambiguous notion of moral harm connected with the inappropriateness of having certain thoughts, constructing particular fantasies and imagining specific scenarios'.³⁰⁷ In other words, that criminalisation rests on the existence of a 'moral consensus' that is inherently relative.³⁰⁸

A key issue is how society distinguishes, or decides, the 'social acceptance of virtual immoral acts'.³⁰⁹ Characterising this issue, Luck argues that there are no convincing explanations to establish a 'moral distinction' between acts of virtual murder and

³⁰² John Quigley, 'Child Pornography and the Right to Privacy' (1991) 43 *Florida Law Review* 347, 403.

³⁰³ Ibid 404.

³⁰⁴ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 [108]; *Coleman v Power* (2004) 209 ALR 182, [209] (McHugh J).

³⁰⁵ New South Wales Council for Civil Liberties, 'Submission to Joint Standing Committee on Treaties' (Department of House of Representatives Optional Protocol to the Convention on the Rights of the Child on the sale of child, child prostitution and child pornography, 2005) 2.

³⁰⁶ See, eg, *Charter of Human Rights and Responsibilities Act 2006* (Vic).

³⁰⁷ Stephen Conroy, 'Measures to Improve Safety of the Internet for Families' (Speech delivered at Treasury Place Melbourne, 15 December 2009).

³⁰⁸ Brian Simpson, 'Controlling Fantasy in Cyberspace: Cartoons, Imagination and Child Pornography' (2009) 18(3) *Information & Communications Technology Law* 255, 256.

³⁰⁹ Eneman, Gillespie and Stahl, above n 81, 4.3.

³¹⁰ Morgan Luck, 'The Gamer's Dilemma: An Analysis of the Arguments for the Moral Distinction Between Virtual Murder and Virtual Paedophilia' (2009) 11 *Ethics and Information Technology* 31, 35.

virtual paedophilia.³¹⁰ While not suggesting that ‘virtual paedophilia should be deemed morally permissible’, Luck asks whether the lack of a ‘moral distinction’ brings into question a large amount of popular entertainment that features extreme violence.³¹¹ Yet, rebutting such questioning, Eneman and colleagues point to ‘conceptual inaccuracies’ that overlook the fact that ‘normally’ computer games depict ‘virtual killing’ rather than ‘virtual murder’ as the avatar (e.g., the soldier) engages in justifiable killing.³¹²

The type of explanation given under the feminist perspective works less well when the child is virtual, as it must rest only on the assertion that such material ‘[r]einforces negative opinions of children’.³¹³ Levy argues that ‘[t]here are strong reasons to believe that virtual child pornography is one more piece in a set of interlocking societal relations and practices which harm women’.³¹⁴

While recognising this type of explanation is ‘most established’,³¹⁵ Gillespie argues that it does not provide a standalone justification for criminalising virtual-CEM but instead applies to ‘all those forms of pornography identified within the feminist critique’.³¹⁶ As such, it has limited use unless accepted for other types of adult pornography, which Gillespie states is ‘unlikely’.³¹⁷ Providing further criticism, Ost argues that to avoid accusations of ‘legal moralism’ in the criminalisation of virtual-

³¹⁰ Ibid 35; Garry Young, ‘Enacting Taboos as a Means to an End; But What End? On the Morality of Motivations for Child Murder and Paedophilia within Gamespace’ (2013) 15 *Ethics and Information Technology* 13, 22 (putting forward a similar, albeit narrower argument stating that based solely on players’ motivation, ‘the virtual murder of children and virtual paedophilia cannot be distinguished’).

³¹¹ Luck, above n 309, 36. That said, in Australia at least, the scope of criminalisation covers material depicting a child as the victim of ‘torture, cruelty or physical abuse’ see, eg, *Criminal Code 1995* (Cth) s 473.1.

³¹² Eneman, Gillespie and Stahl, above n 81, 4.5. Whether this is in fact ‘normal’ is dubious reasoning see, eg, Iain Donald, ‘Just War? War Games, War Crimes, and Game Design’ (2017) *Games and Culture* 1, 7 (pointing out that there are ‘multiple examples of games violating the “laws of armed conflict”’).

³¹³ Ministry of Justice, ‘Consultation on the Possession of Non-Photographic Visual Depictions of Child Sexual Abuse: Summary of Responses and Next Steps’ (Northern Ireland Office, 2007) <<http://webarchive.nationalarchives.gov.uk/http://www.justice.gov.uk/docs/consultation-non-photographic-response.pdf>> 6; Gillespie, above n 50, 113.

³¹⁴ Levy, above n 224, 323.

³¹⁵ Gillespie, above n 50, 113 (stating ‘virtual child pornography sexualises and objectifies children’).

³¹⁶ Ibid 113.

³¹⁷ Ibid.

CEM, there must be a ‘real risk of harm’.³¹⁸ Ost previously characterised any interactions with virtual-CEM as ‘a completely victimless crime’.³¹⁹ In more recent work, Ost has argued that while criminalising the production and first person distribution of virtual-CEM is justifiable,³²⁰ the act of possession (and presumably by extension, the act of accessing) is not.³²¹ According to this account, the former types of behaviour are distinguishable from the latter as they actively ‘encourage ... the propagation of harmful attitudes towards children’.³²² In this context, criminalisation is therefore necessary to ‘avoid a cultural sanctioning of such abuse’.³²³ In contrast, the latter type of behaviour is ‘normatively problematic to criminalise’ because ‘any harm [the offender] causes is indirect and remote’.³²⁴

Against this backdrop, rights-based arguments have gained traction.³²⁵ While they primarily take the form of debate about freedom of speech and individual protection,³²⁶ when raised in Australia reference has been made, albeit unsuccessfully, to the freedom of political communication that is implied into the Australian Constitution.³²⁷

For example, in *Holland v The Queen* [2005] WASCA 140 the Western Australian Court of Appeal rejected arguments that the federal prohibition on the importation of certain material, in this instance CEM, contravened this implied freedom.³²⁸ Roberts-

³¹⁸ Ost, above n 232, 131; Gillespie, above n 83, 53 (reinforcing this point).

³¹⁹ Ost, above n 232, 130.

³²⁰ Ost, above n 270, 231 (calling it ‘non-photographic pornographic images of children (NPPIC); that is, fantasy visual representations of child pornography in the form of, for example, computer-generated images, cartoons or drawings’).

³²¹ Ibid 245.

³²² Ibid 244.

³²³ Ibid 245 citing Martha C Nussbaum, *Sex and Social Justice* (Oxford University Press, 1999) 10 (the Kantian notion that ‘[e]ach human being should be regarded as an end rather than as a means to the ends of others’).

³²⁴ Ost, above n 270, 245.

³²⁵ Cf L L Constantine, ‘The Sexual Rights of Children: Implications of a Radical Perspective’ in F M Martinson (ed), *Children and Sex: New Findings, New Perspectives* (Little Brown, 1981) 255–263 (arguing that ‘legal scapegoating of the publishers, sellers and buyers of child-orientated pornography could actually contribute to a rise in crime(s) against children’ including because they are kidnapped and raped to create it).

³²⁶ Eneman, Gillespie and Stahl, above n 81, 3.1.

³²⁷ See, eg, *Coleman v Power* (2004) 209 ALR 182 [232]–[233].

³²⁸ *Holland v The Queen* [2005] WASCA 140 [109].

Smith JA stated that the material at issue³²⁹ was not ‘part of legitimate political communication’ because its sole purpose was ‘to titillate, to excite or to satisfy a particular prurient interest (that is an interest in child pornography)’,³³⁰ and thus that the material was ‘no more a matter of genuine political discourse than would be a publication which exhorted people to commit, or which described or depicted, murder, racial vilification or the commission of other crimes’.³³¹

That said, some Australian theorists have questioned the legitimacy of criminalising virtual-CEM by focusing on particular groups. Using the example of Japanese manga genre ‘yaoi’, McLelland and Yoo argue that regulating such material is ‘debatable in terms of free speech and respect for the sexual fantasies and sexual expressions of the young’.³³²

In more recent work, McLelland draws even stronger ties between rights expressed in international legal instruments, and young people’s use of types of online media that may stray into the realm of CEM.³³³ In the broader Australian context, civil liberty campaigners also advance arguments premised on notions of freedom of speech. Walton, writing for the New South Wales Council for Civil Liberties, argues that CEM laws must be subject to the *International Covenant on Civil and Political Rights* (‘ICCPR’) to ‘protect those peripheral circumstances [including with respect to virtual-CEM] where [CEM] law inadvertently infringe on the right to privacy and freedom of expression’.³³⁴

Characterising this issue, Walton concludes that, because Australia does not have a bill of rights, the courts are ‘powerless to check the excess of often rushed and ill-considered child pornography legislation’.³³⁵

³²⁹ Ibid [52] (the material at issue was a fictitious book (‘Street Boy Dreams’) dealing with themes including sexual relationships between men and boys and a magazine containing photographs of boys apparently under the age of 16).

³³⁰ *Holland v The Queen* [2005] WASCA 140 [223].

³³¹ Ibid [225].

³³² McLelland and Yoo, above n 282, 101.

³³³ Mark McLelland, “‘Not in front of the parents!’” Young people, Sexual Literacies and Intimate Citizenship in the Internet Age’ (2016) 20(1–2) *Sexualities: Studies in Culture and Society* 234.

³³⁴ New South Wales Council for Civil Liberties, above n 304, 3.

³³⁵ Ibid 26.

2.5 THE EFFECT OF VIEWING ON THE CHILD VICTIM

2.5.1 Viewing a Real Child Furthers Abuse and Exploitation

The central premise of this explanation is that viewing CEM *further*s the effect of the abuse occasioned on the child in the production of the CEM. There are essentially three forms of this explanation, predicated on differing conditions. Under the first condition the child knows the material is online and that it is being viewed (*Condition 1*). Under the second condition, the child is likely to gain this knowledge at some point (*Condition 2*) and under the final condition the child does not have knowledge (*Condition 3*). As such, the main point of contention is whether, for a further effect to manifest, the child must know that the material is being viewed. A child depicted in CEM may not have knowledge for a number of reasons including their very young age, intoxication, covert recording or the denial of a traumatic event.³³⁶

(a) Condition 1: The child knows material is online and that it is being viewed

Where the child knows the material exists and people are viewing it, this explanation is relatively straightforward. In the earlier literature, the theorists explained that a child was ‘haunted’ by the material because of — implying knowledge — the accompanying ‘distressful feeling that his act has been recorded for all to see’.³³⁷

More recently, Ost asserts this is a direct harm in the sense that possession ‘exacerbates’ the primary harm.³³⁸ Indicating that this explanation extends to the act of accessing, Ost states ‘the possession of child pornography could cause the child to

³³⁶ V Jones and E Skogrand, ‘Position Paper Regarding Online Images of Sexual Abuse and Other Internet Related Sexual Exploitation of Children’ (Save the Children Europe Group, 2005); Jennifer Martin, ‘Conceptualizing the Harm Done to Children Made the Subjects of Sexual Abuse Images Online’ (2015) 36(4) *Child & Youth Services* 267.

³³⁷ Shouvin, above n 223, 545 (although, evidence for the claim that the material may ‘haunt’ the child for years to come was an article in the *New York Post* entitled ‘Cardinal Blasts Kid Porn Ruling’ by Ruffin (June 10, 1981) and a private conversation that the author had with one Father Ritter, who had heard from a fifteen-year-old resident of a shelter for homeless and runaway young people, that he could buy a pornographic film of himself, at a local bookstore).

³³⁸ Ost, above n 232, 118, 123.

suffer further harm because of her awareness that other individuals are deriving sexual pleasure from looking at indecent photographs of her’.³³⁹

Dillof reaches the same conclusion based on ‘rule consequentialism’, which holds that an act can be identified as immoral ‘if aggregate with other like acts [it] would produce social ills’.³⁴⁰ Here, the harm is conceptualised as the emotional effect on the child. Dillof explains that the ‘general proliferation of an image of sexual abuse leads to feelings, on the part of the image’s subject, of humiliation, helplessness, and fear of recognition’.³⁴¹

Although, as a general observation, there has been little empirical research into victims’ experience of knowledge that either offenders, or law enforcement agents are viewing the material in which they appear,³⁴² research is slowly beginning to emerge. For example, Leonard describes the effect as causing the child to be ‘continually traumatized’³⁴³ and, more recently, Martin observed that a child with knowledge has a greater ‘traumatic burden’.³⁴⁴ However, to date, the most compelling source of qualitative evidence for this explanation is victim impact statements.

Two oft-cited victim impact statements are those made by ‘Amy’ and ‘Vicky’ who provided details of their experience in an attempt to secure restitution through the United States justice system in *Paroline v United States*, 134 S. Ct. 1710 (2014) (*‘Paroline’*).³⁴⁵ In her victim impact statement, ‘Amy’ describes how the abuse

³³⁹ Ibid 118; Kathryn A Kimball, ‘Losing Our Soul: Judicial Discretion in Sentencing Child Pornography Offenders’ (2011) 63 *Florida Law Review* 1515, 1517 (‘[t]he repeated viewing of their exploitation causes victims to feel violated long after their initial abuse and to fear being recognised by those who find pleasure in their humiliation’).

³⁴⁰ Dillof, above n 252, 37.

³⁴¹ Ibid 38.

³⁴² For early research see, eg, Mimi H Silbert, ‘The Effects on Juveniles of Being Used for Pornography and Prostitution’ in Dolf Zillman and Jennings Bryant (eds), *Pornography: Research Advances and Policy Considerations* (Lawrence Erlbaum Associates Inc, 1989) 215; Deborah Muir, *Violence Against Child in Cyberspace* (ECPAT International, 2005) 30 (commenting that it is about offenders through to law enforcement officers viewing the material).

³⁴³ Marcella Mary Leonard, “‘I did what I was directed to do but he didn’t touch me’: The impact of being a victim of internet offending’ (2010) 16(2) *Journal of Sexual Aggression* 249, 252.

³⁴⁴ Martin, above n 336, 273.

³⁴⁵ Cassell, Marsh and Christiansen, above n 256, 191 (note, the efforts of these two women ultimately resulted with the passing of a bill by the United States Senate in 2015 entitled the ‘Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015’ which ensures courts adopt an

perpetrated against her by her uncle was heightened because he recorded it and subsequently distributed the recordings on the internet. Reflecting on the impact of this ‘Amy’ stated ‘I am being exploited and used every day and every night somewhere in the world by someone. How can I ever get over this when the crime that is happening to me will never end?’³⁴⁶ Describing a similar experience ‘Vicky’ explains how ‘[e]very time [the images] are downloaded I am exploited again, my privacy is breached, and my life feels less safe. I will never be able to have control over who sees me raped as a child’.³⁴⁷

These women only gained knowledge that material in which they were depicted was being viewed and shared online when they were 17, and while ‘Amy’ had suspected the existence of the material, ‘Vicky’ had been completely unaware.³⁴⁸ Indeed, ‘Vicky’s’ victim impact statement also captures the devastating effect of knowledge, as she states that her ‘world came crashing down that day’ with ongoing effects on her mental and physical wellbeing, including fear and anxiety about people who have seen the images trying to find her.³⁴⁹ Indicating the currency of such an argument in the legal context, the court in *Paroline* stated at 1226 that ‘[i]t is common ground that the victim suffers continuing and grievous harm *as a result of her knowledge* that a large, indeterminate number of individuals are viewing and will in the future view images of the sexual abuse she endured’. More generally, it is well established that when sexual abuse is recorded children are more reluctant to disclose the abuse.³⁵⁰ This has a number of negative implications for ‘child protection, social justice and mental health outcomes’.³⁵¹

‘aggregate causation standard’ when assessing restitution claims from victims (<https://www.congress.gov/bill/114th-congress/senate-bill/295/text>).

³⁴⁶ Amy, *The Victim in the ‘Misty’ Child Pornography Series*, *Petitioner v Michael M Monzel et al. On Petition for a writ of Certiorari to the United States Court of Appeals for the District of Columbia* <http://www.missingkids.com/content/dam/nmcen/en_us/documents/legalamicusbriefmonzel.pdf> 12.

³⁴⁷ Ibid 13.

³⁴⁸ Cassell, Marsh and Christiansen, above n 256, 192.

³⁴⁹ Ibid 192–193.

³⁵⁰ Carl Göran Svedin and Kristina Back, ‘Children Who Don’t Speak Out: About Children Being Used in Child Pornography’ (Save the Children, 1996) 25.

³⁵¹ Rosaleen McElvaney, ‘Disclosure of Child Sexual Abuse: Delays, Non-disclosure and Partial Disclosure: What the Research Tells Us and Implications for Practice’ (2015) 24(3) *Child Abuse Review* 159, 159.

(b) Condition 2: The child is likely to gain this knowledge at some point

The second form of this explanation represents a halfway house between knowledge and no knowledge. It is founded on the notion that knowledge will eventuate at some point, therefore the viewing of CEM involves, as Gillespie puts it, a ‘*continuing* harm to the child’.³⁵² This continuing harm is labelled a ‘secondary harm’³⁵³ or ‘secondary victimisation’.³⁵⁴ Gillespie proposes that the *potential* for knowledge is a sufficient basis for criminalisation because, even if an individual is unaware for many years, the eventual impact of knowledge will be similarly traumatic.³⁵⁵ In other words, irrespective of when the individual attains knowledge ‘the harm undoubtedly continues to exist’.³⁵⁶ A helpful analogy might be that this explanation equates the existence of CEM to a ticking bomb. It does not matter when the bomb goes off, the fallout will be similarly devastating.³⁵⁷ The caveat to this explanation is that it presumes the child will find out at some point.³⁵⁸

³⁵² Gillespie, above n 188, 230.

³⁵³ Gillespie, above n 50, 43; Gillespie, above n 188, 230.

³⁵⁴ Gillespie, above n 50, 37–38; Gillespie, above n 188, 230; Julia von Weiler, Annette Haardt-Becker and Simone Schulte, ‘Care and Treatment of Child Victims of Child Pornographic Exploitation (CPE) in Germany’ (2010) 16(2) *Journal of Sexual Aggression* 211, 218 (research conducted on professionals treating victims of CEM, indicates that often it isn’t until adolescence or adulthood that a victim is able to ‘grasp cognitively the concept of permanence, and that, if at all, it will become an issue during adolescence or adulthood’). See also Taylor and Quayle, above n 207, 24 (identifying that one of the reasons for concern about viewing CEM is that ‘[a] photographic record in whatever media preserves the pictures of that abuse. At worst, therefore, it is a permanent record of crime, and serves to perpetuate the images and the memory of that abuse for as long as it exists’); Ethel Quayle and Terry Jones, ‘Sexualized Images of Children on the Internet’ (2011) 23(1) *Sexual Abuse* 7, 7–21.

³⁵⁵ Gillespie, above n 50, 38.

³⁵⁶ Gillespie, above n 188, 230; Gillespie, above n 50, 38.

³⁵⁷ Provided of course the person is alive to be affected.

³⁵⁸ Many of the children in CEM are never identified see, eg, Federal Bureau of Investigation, *Child Pornography Victim Assistance*, Federal Bureau of Investigation Resources <<https://www.fbi.gov/resources/victim-assistance/cpva>> (under the *Crime Victims’ Rights Act* 18 U.S.C. 3771 a mechanism exists under which victims (or their families) must be notified every time their identified image is discovered by law enforcement, although they can opt out. See also United States Sentencing Commission, ‘Federal Child Pornography Offences’ (United States Sentencing Commission, 2012) 319 (noting that the system of notification can result in multiple notifications a week and cause emotional trauma). Note also, disclosure represents an ethical quandary in and of itself see, eg, Tink Palmer, ‘Behind the Screen: Children Who Are the Subject of Abusive Images’ in Ethel Quayle and Max Taylor (eds), *Viewing Child Pornography on the Internet* (Russell House Publishing, 2005) 64–66 (‘the effects of disclosure on the child should never be underestimated. Knowledge of the discovery of the images can be emotionally devastating due to the “double silencing” ... and we need

(c) Condition 3: The child does not have knowledge

The third form of this explanation is that irrespective of whether the child has knowledge, exploitation still occurs. Characterising this, Ost states that '[t]he possessor exploits the child since, by possessing the image, he is taking unfair advantage of her and using her as a means to an end, whether or not the child is aware that the image is in the possession of others'.³⁵⁹ As an aside, Ost proposes two lines of argument to justify criminal liability in this context.³⁶⁰ These arguments underlie and provide a deeper account of why, because of the effect on the child, the action of a viewer should be treated as criminal. In brief, Ost argues that it is fair to impute criminal liability to the offender (the possessor and arguably the viewer) for the *retrospective* effects on the child by the production of the images where the viewer knows 'the nature of the material and the producer's use of children in order to create the images'.³⁶¹ According to Ost, 'a normative link can be found on the basis of the possessor obtaining the proceeds on the primary wrong' (the child sexual abuse).³⁶² Ost explains this by reference to the notion that 'the possessor underwrites the primary harm already committed'.³⁶³ In turn, this argument is premised on Baker's argument that 'it is wrong to receive benefits which you know can only be obtained when another person harms others; and if you do, you become normatively involved in the underlying primary harm'.³⁶⁴

The second line of argument is *prospective*, and applies in circumstances where the offender (again, the possessor and arguably the accessor) 'encourages' the producer to create CEM so that he 'can acquire more material for his collection'.³⁶⁵ As Ost argues

to think carefully about how we deal with such matters to ensure that the professional system itself doesn't become an agent of abuse').

³⁵⁹ Ost, above n 232, 119.

³⁶⁰ Ibid 118 (explaining that the 'the remote harm is connected to the subsequent primary harm rather than a harm that has already occurred').

³⁶¹ Ibid 118.

³⁶² Ibid 117.

³⁶³ Ibid 118.

³⁶⁴ Dennis J Baker, 'The Moral Limits of Criminalizing Remote Harms' (2007) 10(3) *New Criminal Law Review: An International and Interdisciplinary Journal* 370, 387–388 (noting 'purchaser of child pornography can be normatively linked to the wrongful harm that is caused to *real children* who are used in child pornography, because the normative implication is simply that you are receiving the fruits of a criminal harm').

³⁶⁵ Ost, above n 232, 118.

‘this encouragement can establish a normative link, *provided* the influence exerted by the possessor is intentional’.³⁶⁶

The use of the term ‘intentional’ necessarily circumscribes the applicability of this explanation. It conveys the meaning posited by Williams that the offender has the creation of CEM as their ‘purpose’ rather than being merely anticipated as a possible likelihood.³⁶⁷ It is unclear whether this argument applies to the large proportion of viewing based activities where the producer is unknown and the material is not paid for but is viewed for free via anonymous networks like P2P networks (see, 1.3.2).

The children’s rights movement (see, 1.2.2) gives rise to a further explanation in this context. Although rights-based explanations take a number of forms, they are unified by the fact that the child having knowledge is not a cornerstone. By way of example, this is typified by the comments of the Canadian Supreme Court in *R v Sharpe* [2001] 1 SCR 45 (*‘Sharpe’*) in which, at 45, it was stated that the harm occasioned to children by the possession of CEM ‘exists independently of any dissemination and *follows from the existence of pornographic representations*, which in itself violate the dignity and equality rights of children’.³⁶⁸

In the literature, Rogers argues that even if a child is ‘unaware the image was made or circulated’ those who view such material ‘harm the child’s inherent right of human dignity not to be viewed in this fashion’.³⁶⁹ In a similar vein, Martin contends that ‘[e]very instance of viewing an image of child sexual abuse represents a renewed violation of the privacy of the children in the images and the continuation of their abuse’.³⁷⁰

Combining these concepts, Harduf has recently proposed ‘Dignity Theory’, which, he argues, has both an ‘intrinsic’ and ‘instrument’ dimension. The former provides ‘[e]lectronic child pornography possession = violation of children’s dignity and

³⁶⁶ Ibid 118.

³⁶⁷ Baker, above n 364, 384–385 (citing Glanville L Williams, ‘Complicity, Purpose and the Draft Code –I’ (1990) 4(9) *Criminal Law Review* 4, 4–21).

³⁶⁸ Emphasis added.

³⁶⁹ Audrey Rogers, ‘The Dignitary Harm of Child Pornography – From Producers to Possessors’ in Carissa B Hessick (ed), *Redefining Child Pornography Law: Crime, Language, and Social Consequences* (University of Michigan Press, 2016) 177.

³⁷⁰ Martin, above n 336, 279.

privacy’,³⁷¹ while the latter provides ‘[e]lectronic child pornography possession → distributing photos, until they reach the depicted child’s social circle → violation of the child’s dignity and privacy’.³⁷²

The former does not require any degree of knowledge for the violation to occur because, as Harduf puts it, ‘privacy may be violated without future consequences and externalities’.³⁷³ In contrast, the latter requires the child, or someone that the child knows, to have knowledge as it ‘focuses on social goals and values that privacy serves’ (e.g., the child (or now adult) experiences negative emotions such as humiliation).³⁷⁴

Identifying a further variation, Bailey invokes equality, directing attention to the broader ‘social harms’ that commodification ‘may occasion on community commitments to equality and dignity’ and children and young people in particular.³⁷⁵ As such, the ‘harm’ is the potential for the viewing of CEM to undermine ‘community aspirations for a society founded on equality among all citizens’.³⁷⁶

While not directly referencing a right per se, O’Donnell and Milner argue one of the ‘harmful effects’ of CEM is that the children who are ‘exploited through child pornography have no voice’.³⁷⁷ On this basis, they identify that one of the justifications for ‘outlawing’ CEM is to tackle this ‘invisibility’.³⁷⁸

2.6 SUMMARY

³⁷¹ Harduf, above n 190, 301 (for the equated concept of ‘dignity and privacy’ Harduf relies on analysis by Robert C Post, ‘Three Concepts of Privacy’ (2001) 89 *The Georgetown Law Journal* 2087, 2092–2093 (stating ‘[t]o equate privacy with dignity is to ground privacy in social forms of respect that we owe each other as members of a common community’)).

³⁷² Harduf, above n 190, 301.

³⁷³ Ibid 295.

³⁷⁴ Ibid 295.

³⁷⁵ Jane Bailey, ‘Confronting Collective Harm: Technology’s Transformative Impact on Child Pornography’ (2007) 56 *University of New Brunswick Law Journal* 56, 81.

³⁷⁶ Ibid 81.

³⁷⁷ O’Donnell and Milner, above n 186, 71.

³⁷⁸ Ibid 69–72.

This chapter reviewed explanations for criminalisation put forward by key theorists. In doing so, a number of Effect Categories were identified: the *Viewer*, *Other Offenders*, *Society* and, for material involving a real child, the *Child Victim*.

As summarised in *Table 1* below, under the category of the *Viewer*, two key explanations were identified. The first, as it applies to the viewing of material involving a real child, is that exposure to CEM will incite an individual to offend against a child, or promote attitudes towards children that make it easier to offend (see, 2.2.1). The second is that CEM is a tool that is capable of being used to groom a child, and thereby offend (see, 2.2.3). Similar arguments are made about the effect of viewing virtual material, although they attract heavy criticism. As noted above, empirical evidence constrains, or at least delimits, the applicability of such explanations (see, 2.2.2 and 2.2.3).

Under the category of *Other Offenders*, the premise of explanations is that the behaviour of a viewer has an effect on the actions of other offenders. Where the material involves a real child, the contention is that viewing creates or fosters a market dynamic. Yet, there is a broad and a narrow view with regard to the condition by which the behaviour of the viewer triggers this dynamic. The broad view holds that a number of conditions, further to financial gain, may trigger other offenders to act provided they have knowledge. In turn, the narrow view sees only financial gain as the sufficient condition (see, 2.3.1 generally).

Providing a counterpoint, the primary explanation for virtual material is that allowing individuals to partake in a market — that is, pay for virtual-CEM — may support, or prop up, the market for material involving real children. Here, the key concern is that the financial gain received from the supply of virtual material will be directed to the supply of material involving real children. That said, a countervailing consideration is also identified, namely, that the existence of a market for virtual-material reduces demand for material depicting real children by, in effect, providing a substitute (see, 2.3.2).

Under the third Effect Category, *Society*, the moral value in protecting children is paramount. Buoyed by the ascendancy of the protectionist discourse around children, explanations under this category take two main forms: that criminalisation expresses

intolerance of all forms of child sexual abuse, and feminist arguments about the damaging effects of commodifying and sexualising children in modern society. That said, misgivings about the capacity of CEM law to protect children are also raised (see, 2.4.1).

For virtual-CEM, explanations within this Effect Category turn on whether criminalising the viewing of such material protects children in general, although a key area of contention is how to conceptualise the immorality involved. There is also contention about whether, even if virtual-CEM commodifies and sexualises representations of children, the effect of viewing such material in this regard is too remote to warrant criminalisation (see, 2.4.2). Admittedly, and at least in Australia, rights-based arguments have largely failed to offset, or counter, explanations within this Effect Category (see, 2.4 generally).

Where the material involves a real child, the Effect Category of the *Child Victim* is also relevant. Explanations in this category fall under three conditions outlined above, and which turn on the whether the child has knowledge, is likely to gain knowledge, or does not have knowledge (see, 2.5.1 (a)–(c)).

Table 1 – A summary of explanations for criminalisation within the Effect Categories

EXPLANATION			
		MATERIAL INVOLVING A REAL CHILD	MATERIAL INVOLVING A VIRTUAL CHILD
EFFECT CATEGORIES	VIEWER	<i>Risk of child sexual abuse</i>	E.g., incites child sexual abuse and/or fosters negative attitudes towards children Ibid
		<i>Issue(s): For both types of material there is a question about the nature of this risk.</i>	
		<i>Risk of grooming</i>	E.g., risk that material will be used to groom a child Ibid
		<i>Issue(s): Is exposure to either type of material the critical determinate of abuse?</i>	
	OTHER OFFENDERS	<i>Market</i>	E.g., only trigger is financial gain (i.e., payment) C.f., supports the market for CEM (e.g., financial conduit) C.f., depreciating effect of market for real child
		<i>Issues(s): Further to disagreement about the condition under which the behaviour of a viewer triggers other offenders to act, there is a question about how significant the impact of a viewer's behaviour is likely to be</i>	
	SOCIETY	<i>Morality</i>	E.g., the protection of children (i.e., non-tolerance argument) and feminist arguments (e.g., commodification and sexualisation of children) C.f. questions about how to establish the moral harm, and the effect of viewing perceived as too remote
		<i>Issues(s): For both types of material, criticism from a rights perspective (esp. material involving a virtual child)</i>	
	CHILD VICTIM		<i>Condition 1</i> (knowledge) the act of viewing causes further distress to the child who knows the material is online and being viewed
			<i>Condition 2</i> (likelihood of knowledge) the act of viewing continues the potential for distress to be caused to the child
			<i>Condition 3</i> (no knowledge) the act of viewing is a form of ongoing exploitation irrespective of knowledge; and, a contravention of the child's right (e.g., dignity privacy and equality)
			<i>Issues(s): Whether or not the child has knowledge</i>

2.7 CONCLUSION

As foreshadowed in the introduction to this chapter, the review of explanations for criminalisation provides a structure through which to map the gaps between theorists and lay understandings of the effects of viewing CEM across the Effect Categories. This review demonstrates that many explanations rest on assertions of risk, and effects that are theoretical rather than necessarily tangible, that is, firmly based on empirical evidence. It is tempting simply to conclude — as many do — that more research is needed to evaluate such explanations. Yet, this conclusion ignores the role of pragmatism, as discussed above, and fails to acknowledge that within the current political milieu, the winding back of such laws is improbable; indeed, recent trends suggest the reverse is more likely.³⁷⁹

Thus, this chapter provides for an alternative and arguably more valuable means to evaluate these explanations where the intention is to contribute towards improving the functioning of the existing legislative and policy architecture from the perspective of preventing crime. Using criminological and legal theory, the following two chapters provide the foundation for this argument. Together, Chapter 3 and Chapter 4 examine the role of public awareness of explanations for criminalisation in the context of preventing the first deliberate viewing of CEM.

³⁷⁹ In the last three years, both the Victorian and South Australian governments have expanded the scope of criminalisation see, eg, Crimes Amendment (Child Pornography and Other Matters) Bill 2015 s 3 inserting s 67A into the *Crimes Act 1958* (Vic); Statutes Amendment (Child Exploitation and Encrypted Material) Bill 2017 (SA).

CHAPTER 3: PREVENTING VIEWING – LESSONS FROM CRIMINOLOGICAL THEORY

3.1 INTRODUCTION

Under Australian law it is a criminal offence to view a range of materials that involve real and virtual children online (see, 1.2.4). Although such material may not be as readily searchable through search engines as it once was, it is endemic to some online networks (see, 1.3.2). If only a limited cohort of individuals viewed such material, for example, those fitting the stereotype of a paedophile offender, then perhaps there would be little reason to expect the State to do more than arrest and prosecute those who violated this prohibition.

However, this is not the case, and today the problem is characterised as ‘supply-led’.³⁸⁰ Given this, the most obvious argument to pursue is that the State should do more to address the prevalence and accessibility of material online. Yet, this chapter instead argues that the State should do more to prevent individuals from beginning to view CEM in the first instance, that is, do more to prevent onset. While tackling supply is vital, this chapter contends that the nature of this type of offending means it is also important for the State to have a strategy to prevent onset.

To advance this argument, this chapter begins by introducing key concepts of crime prevention and examines the existing policy architecture relevant to online CEM offending at the national level. This examination highlights the lack of attention given to initiatives that seek to prevent the viewing of CEM in the first instance — this is conceptualised as a policy blind spot. In this chapter, three arguments are used to build the case that there is value in addressing this blind spot. Or, put another way, to make the point that a potentially valuable opportunity for prevention is being missed. The parameters of this missed opportunity are outlined using the lens of Situational Crime Prevention theory (SCP) and reference to the vulnerabilities of a key SCP offender type, the Opportunistic Offender. The final part of this chapter marries this SCP offender type with existing research into public perceptions to reveal further insight.

³⁸⁰ Wortley and Smallbone, above n 50, 3.

3.2 A BRIEF INTRODUCTION TO CRIME PREVENTION THEORY

Broadly speaking, crime prevention is ‘any action that results in the reduced likelihood of a criminal act occurring’.³⁸¹ It is typically divided into three categories, originally conceptualised by Brantingham and Faust as primary, secondary and tertiary prevention.³⁸² While it is generally considered more useful to conceptualise crime prevention as a ‘continuum along which various strategies can be located rather than as a categorical schema’,³⁸³ these broad categories help to, in the context of this thesis, to direct attention to the key area of focus.

Primary prevention initiatives target ‘underlying factors that have a basic influence on everyone, shaping people, sites and situations that are amenable to criminal events’.³⁸⁴ Such initiatives rely on ‘the discovery of risk and protective factors associated with a specific problem’.³⁸⁵ By contrast, secondary and tertiary initiatives respectively address those at high risk of offending, and those already offending (e.g., through detection, prosecution and incarceration).³⁸⁶

Of relevance for CEM offending, Wortley and Smallbone identify that primary prevention has two aims. The first aim is ‘to prevent children from being the subject of [CEM] images’ (First Aim) while the second aim is ‘to prevent potential offenders from producing, distributing, or using [CEM] for the first time’ (Second Aim).³⁸⁷ For the purpose of this chapter, reference to the Second Aim of primary prevention is limited to the third aspect of this definition, that is, the first time use of CEM.³⁸⁸

³⁸¹ Gloria Laycock, ‘Crime Prevention (Situational and Social)’ in Tim Newburn and Peter Neyroud (eds), *Dictionary of Policing* (Willan Publishing, 2008) 59.

³⁸² Paul J Brantingham and Frederic L Faust, ‘A Conceptual Model of Crime Prevention’ (1976) 22(3) *Crime & Delinquency* 284, 284.

³⁸³ Wortley and Smallbone, above n 50, 90–91.

³⁸⁴ Patricia Brantingham, Paul Brantingham and Wendy Taylor, ‘Situational Crime Prevention as a Key Component in Embedded Crime Prevention’ (2005) 47(2) *Canadian Journal of Criminology and Criminal Justice* 271, 274–275.

³⁸⁵ Stephen Smallbone, William L Marshall and Richard Wortley, *Preventing Child Sexual Abuse: Evidence, Policy and Practice* (Routledge, 2014) 48.

³⁸⁶ Brantingham, Brantingham and Taylor, above n 384, 274.

³⁸⁷ Wortley and Smallbone, above n 50, 89.

³⁸⁸ *Ibid* 89.

Admittedly, initiatives that fall within this limited definition of the Second Aim of primary prevention can also be described as secondary prevention, where they target a potential offender who is at risk of offending.³⁸⁹ Yet here, Wortley and Smallbone's conceptualisation is preferred as it better reflects the fact that there are real difficulties identifying those who are at such risk (see, 3.4.3).³⁹⁰

3.3 AN ASSESSMENT OF THE NATIONAL PUBLIC POLICY RESPONSE – IS THERE A POLICY BLIND SPOT?

Using the crime prevention lens identified above (see, 3.2), this part argues that the national policy response to CEM offending in Australia evinces a policy blind spot within primary prevention. Currently, primary prevention initiatives are heavily weighted towards initiatives that seek to reduce the likelihood that children will be victimised, what Wortley and Smallbone characterised as the First Aim of primary prevention.³⁹¹ In comparison, apart from initiatives that seek to tackle self-generated material by young people,³⁹² little (if any) attention is given to the need to prevent offending behaviour among those who might be at risk of onset (Second Aim).

Within the sphere of primary prevention, the Australian policy response is chiefly contained in three key policy documents that intersect cyber safety and cybercrime, and cover the period from before the introduction of accessing offences to today (see, 1.2.2 for overview).

The first of these is *Tomorrow's Children: Australia's National Plan of Action against the Commercial Sexual Exploitation of Children* ('*Tomorrow's Children*'). Released in 2000 by the Department of Family and Community Services under the Howard Liberal government, this policy emphasises the need for a 'tough stance' to 'combat all forms of child pornography'.³⁹³ In addition to emphasising the importance

³⁸⁹ Ibid 90.

³⁹⁰ Ibid 90.

³⁹¹ Wortley and Smallbone, above n 50, 89.

³⁹² See, eg, Office of the eSafety Commissioner, *Sexting Australian Government* <<https://www.esafety.gov.au/esafety-information/esafety-issues/sexting/sexting-information-for-teachers>>. See also Crofts et al, above n 282, 90 (pointing out that there has been a failure to evaluate the efficacy of education campaigns aimed at young people in this area).

³⁹³ Commonwealth of Australia, 'Tomorrow's Children: Australia's National Plan of Action' (Department of Family and Community Services 2000) 15.

of ‘toughening’ the legislative response to CEM, the government identified that ‘[s]uccess in reducing child pornography in the future will lie in a number of different spheres: decreasing children’s vulnerability, international cooperation, and the regulation of new technologies’.³⁹⁴

Superseding *Tomorrow’s Children*, in 2009 the Rudd Labor government through the Department of Social Services, released *Protecting Children is Everyone’s Business: National Framework for Protecting Australia’s Children 2009–2020* (‘*National Framework*’). Under this framework, state and territory governments agreed to work collaboratively to achieve the overarching objective of ensuring ‘Australia’s children and young people are safe and well’.³⁹⁵

This objective is underpinned by six supporting outcomes that align with the First Aim of primary prevention as they seek to reduce children’s vulnerability to victimisation.³⁹⁶ This focus has led to the development of a host of curriculum based cyber-safety initiatives.³⁹⁷ Federal agencies, state and territory police and the online industry have developed a wealth of online and offline resources for children, parents and carers.³⁹⁸

Yet, at least as originally conceptualised, there was a possible exception to the narrow focus on reducing children’s vulnerability to victimisation in the form of Strategy 6.1, which specifies that the federal government will implement cyber-safety initiatives such as ‘filtering including search warning mechanisms’.³⁹⁹ Admittedly no explicit mention is made of a need to target potential offenders under this strategy, however, the implementation of filtering could fit loosely within the Second Aim of primary prevention on the basis that it ‘filters out’ or, in other words, blocks access to websites known to contain CEM, thereby reducing a potential offender’s vulnerability to

³⁹⁴ Ibid 19.

³⁹⁵ Council of Australian Governments, ‘Protecting Children is Everyone’s Business’ (Commonwealth of Australia 2009–2020) 11.

³⁹⁶ Ibid 11–36.

³⁹⁷ Anti-Slavery Australia, ‘Behind the Screen: Online Child Exploitation in Australia’ (Anti-Slavery Australia, 2017) <<http://www.antislavery.org.au/images/behind%20the%20screen%20-%20report.pdf>> 143.

³⁹⁸ Ibid 138.

³⁹⁹ Council of Australian Governments, above n 395, 32 (Strategy 6.1).

unintentional exposure.⁴⁰⁰ That said, mention of this strategy disappeared from subsequent progress reports,⁴⁰¹ likely due, in no small part, to strong criticism of the government's proposal to filter the internet.⁴⁰²

As a further point on cyber-safety, since July 2015, the Office of the Children's eSafety Commissioner, now the eSafety Commissioner, became the leading statutory body responsible for cyber-safety in Australia.⁴⁰³ It has a number of functions relating to the online safety of Australians.⁴⁰⁴ This includes the operation of the cyber[Report!] tipline, which is described as a 'frontline mechanism in Australia for combating child pornography'.⁴⁰⁵ The core function of the cyber[Report!] tipline is to act as an anonymous complaint mechanism through which members of the Australian community and members of law enforcement agencies can report online material for investigation and possible removal.⁴⁰⁶ Yet, Australia's use of the cyber[Report!] tipline is not supported by a public awareness campaign to encourage reporting, and offset the potential for a lack of awareness about how to report CEM or the likelihood that people will simply ignore such material.⁴⁰⁷

⁴⁰⁰ See generally Alana Maurushat and Renee Watt, 'Clean Feed: Australia's Internet Filtering Proposal' (2009) (Paper 7) *University of New South Wales Research Paper* 10, 1.

⁴⁰¹ Department of Social Services, 'Second Three-year Action Plan, 2012–2015: Protecting Children is Everyone's Business – National Framework for Protecting Australian's Children 2009–2020' (Commonwealth of Australia, 2012) <https://www.dss.gov.au/sites/default/files/documents/09_2012/second_action_plan.pdf>; Department of Social Services, 'National Framework for Protecting Australia's Children – Third Three-Year Action Plan 2015–2018' (Commonwealth of Australia, 2015) <https://www.dss.gov.au/sites/default/files/documents/12_2015/pdf_third_action_plan_for_protecting_australias_children.pdf>.

⁴⁰² See generally Maurushat and Watt above n 400, 10 (posing the question, '[i]f we are concerned about deliberate adult access to child pornography, is a technologically-clumsy filter really up to the job?' and going on to point out that other means of access, such as P2P networks are not affected).

⁴⁰³ *Enhancing Online Safety for Children Act 2015* (Cth) s 15.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ citizenacma, *Dramatic Rise in Child Sexual Abuse Material Investigations* <<https://www.acma.gov.au/Citizen/Internet/esecurity/Staying-safe-online/dramatic-rise-in-child-sexual-abuse-material-investigated-australians-play-key-part-in-removal>>.

⁴⁰⁶ Office of the eSafety Commissioner, *Offensive and Illegal Content Complaints* <<https://www.esafety.gov.au/complaints-and-reporting/offensive-and-illegal-content-complaints>>.

⁴⁰⁷ While there is a lack of Australian research, a representative study of males aged 16–24 years old conducted in the United Kingdom found that 40 per cent of participants were unaware of how to report CEM and a further 12 per cent would ignore it if they saw it, see COMRES, 'Internet Watch Foundation Sexual abuse Survey: A Public Opinion survey on Behalf of the Internet Watch Foundation' (18 March 2013) <<http://www.comresglobal.com/wp-content/uploads/2017/08/Internet-Watch-Foundation-16-24-Year-Olds-Survey-Data-Tables.pdf>>.

In this respect, Australia's response falls short of that of Canada, where the Canadian Centre for Child Protection operates Cybertip.ca through which, in addition to a national tipline for reporting CEM, a variety of public awareness raising activities are undertaken which seek to inform and encourage members of the public to report CEM.⁴⁰⁸ By way of example, since 2012, Cybertip.ca has run a number of campaigns deployed online and offline.⁴⁰⁹ These campaigns have used messages that, while explicitly targeting the general population, also fit under the Second Aim on the basis that they may affect the offending readiness of some potential offenders (see further, 3.4).⁴¹⁰ For example, 'Accidently come across Child Pornography? Save Me. Help These Kids. Report at www.cybertips.com'.⁴¹¹

The third policy document produced by the Australian government relates to the area of cybercrime more generally. In 2013, the then Commonwealth Attorney General, Mark Dreyfus, announced the *National Plan to Combat Cybercrime* ('*National Plan*'). The National Plan identifies four key principles that underlie Australia's national response.⁴¹² Of relevance here, the third key principle relates to the importance of '[f]ocusing on prevention'.⁴¹³ In recognition that 'preventative measures are relatively low-cost and easy to implement', the National Plan states 'Australian governments recognise that it is better to prevent cybercrime from happening than to respond to it after it has occurred'.⁴¹⁴

Despite the apparent recognition of the value of prevention, the former statement is qualified by the subsequent sentence that provides '[u]sers need to take steps to avoid falling victim to cybercrime and governments and industry need to be proactive in

⁴⁰⁸ cybertip!ca, 'cybertip!ca: A 10 Year Review of Canada's Tipline for Reporting the Online Sexual Exploitation of Children' (Canadian Centre for Child Protection 2012) 23–29.

⁴⁰⁹ cybertip!ca, *Public Awareness* Canadian Centre for Child Protection <https://www.cybertip.ca/app/en/projects-public_awareness>.

⁴¹⁰ Steel, above n 108, 155.

⁴¹¹ cybertip!ca, above n 409, 23–29. As an aside, other organisations, such as the Thorn Deterrence Program, seek deter individuals from engaging with CEM through the use of pop-up warning messages triggered by key word searches to communicate 'directly with people searching for [CEM], disrupting their sense of anonymity and encouraging them to seek help' see Thorn, *Deterring behaviour online* <<https://www.wearethorn.org/deterrence-prevent-child-sexual-abuse-imagery/>>.

⁴¹² Attorney-General's Department, 'National Plan to Combat Cybercrime' (Australian Government, 2013).

⁴¹³ Ibid 7.

⁴¹⁴ Ibid.

anticipating where new threats might emerge'.⁴¹⁵ In other words, applied to CEM offending, the second sentence suggests that the focus is reducing the likelihood of victimisation (First Aim). This is underlined by the 'key priority areas for action' identified in the National Plan, which while making no reference to prevention per se, emphasise the importance of 'educating the community to protect themselves'.⁴¹⁶

As a further note, in May 2017, the Law, Crime and Community Safety Council agreed to begin work on a new National Plan to Combat Cybercrime to 'to ensure a strong national approach to tackling the increasing risks to business and individuals posed by cybercrime'.⁴¹⁷ According to the Commonwealth Attorney-General's Department, this new plan will be finalised in April or May 2018 — however, it is not forthcoming at this time.⁴¹⁸ Subject to further details being released, it is also unclear what impact the newly announced Australian Centre to Counter Child Exploitation (ACCCE) may have in this area.⁴¹⁹

The general lack of attention given to the Second Aim of primary prevention in Australia is reinforced by two recent reports. In a report entitled *Behind the Screen*, Anti-Slavery Australia concluded that the current approach to cyber-safety in Australia effectively overlooks offenders.⁴²⁰ The authors stress the need for the 'cultural causes of online child exploitation' to be addressed, and recommend a greater focus on primary prevention.⁴²¹ A more recent report by Saunders and McArthur into primary prevention initiatives for child sexual abuse in Australia

⁴¹⁵ Ibid.

⁴¹⁶ Ibid 8–11, 27 (identifying that the 'desired outcome' of this priority area is that '[a]ll Australians are aware of the risks of cybercrime, can take steps to protect themselves, and know where they can get help if they fall victim to cybercrime').

⁴¹⁷ Crime and Community Safety Law, 'Communiqué Law, Crime and Community Safety Council' (Law, Crime and Community Safety Council, 19 May 2017 2017) <<https://www.ag.gov.au/About/CommitteesandCouncils/Law-Crime-and-Community-Safety-Council/Documents/19-May-LCCSC-Communique.pdf>>.

⁴¹⁸ Attorney-General's Department, *National Cybercrime Working Group: Cybercrime* Australian Government <<https://www.ag.gov.au/CrimeAndCorruption/Cybercrime/Pages/default.aspx>>.

⁴¹⁹ Minister for Law Enforcement and Cyber Security (Cth), 'Joint media release with the Hon Peter Dutton MP – Australian Centre to Counter Child Exploitation' (Media Release, 25 March 2018) <<http://minister.homeaffairs.gov.au/angustaylor/Pages/australian-centre-to-counter-child-exploitation.aspx>>.

⁴²⁰ Anti-Slavery Australia, above n 397, 147.

⁴²¹ Ibid 148.

generally, identified that there was a ‘significant gap in the availability of services and support for individuals with problematic sexual thoughts towards children’.⁴²²

Providing a useful counterpoint for CEM offending, the United Kingdom government directly targets potential offenders through a number of initiatives, which cover the Second Aim of primary prevention. In 2013, the United Kingdom government led by then Prime Minister David Cameron, encouraged internet search engine companies (e.g., Google and Microsoft Bing) to act to prevent access to CEM through their platforms.⁴²³

In response, both Google and Microsoft changed their algorithms and introduced ‘pop-up’ warning messages (i.e., splash pages) that aim to prevent and deter search queries for CEM related material from individuals in the United Kingdom. For example, Bing uses ‘pop-up’ messages triggered by searches for ‘blacklisted’ search terms to target internet users who ‘may be drifting towards trying to find illegal child abuse content on the web via search engines’.⁴²⁴ Moreover, the United Kingdom government also provides funding for the Stop It Now! program and helpline run by the Lucy Faithful Foundation.⁴²⁵ Explaining the work of the Foundation, Donald Findlater states that ‘[i]f we want to tackle demand for sexual images of under 18s, then we have to work harder to prevent people from looking at these images in the first place’.⁴²⁶

A critical component of the service offered by this foundation is the confidential Stop It Now! Helpline (the ‘Helpline’) which seeks to strengthen an individual’s internal

⁴²² Vicky Saunders and Morag McArthur, ‘Help-Seeking Needs and Gaps for Preventing Child Sexual Abuse: A Report for the Royal Commission into Institutional Responses to Child Sexual Abuse’ (Institute of Child Protection Studies, Australian Catholic University, 2017) 11.

⁴²³ Mark Ward, ‘Google and Microsoft Agree Steps to Block Abuse Images’, *BBC News* (online), 18 November 2013 <<http://www.bbc.com/news/uk-24980765>>.

⁴²⁴ Heather Saul, ‘The search engine will now warn users when they are in danger of accessing illegal material’, *Independent* (online), 27 July 2013 <<http://www.independent.co.uk/life-style/gadgets-and-tech/microsoft-introduces-bing-pop-up-warning-for-child-abuse-search-terms-8734781.html>>.

⁴²⁵ Lucy Faithful Foundation, ‘The Lucy Faithful Foundation Annual Report and Financial Statements’ (The Lucy Faithful Foundation, 2017) <https://www.lucyfaithfull.org.uk/files/Lucy_Faithfull_Annual_Report_2016_17.pdf> 39.

⁴²⁶ Lucy Faithful Foundation, ‘Lucy Faithful Foundation Welcomes NSPCC Call for Action to Deter People from Viewing Sexual Images of Children Online’ (Media Release, 8 November 2016) 1 <https://www.lucyfaithfull.org.uk/files/LFF_welcomes_NSPCC_call_for_action_to_deter_people_from_viewing_sexual_images_of_children_online.pdf>.

inhibitions against offending through the provision of therapeutic advice and support and, where indicated, referrals to follow-up services.⁴²⁷ Between 2002 — when the Helpline was launched — and 2012, the Helpline received over 17 000 calls from more than 5 500, mainly adult males who were concerned about their ‘sexual thoughts, feelings and/or behaviour towards children’.⁴²⁸ These figures represent only a fraction of the total number of calls made to the Helpline, as many calls go unanswered due to inadequate resources.⁴²⁹ Resourcing gaps remain, despite the United Kingdom Prime Minister, David Cameron, emphasising the ‘vital’ service provided by the Helpline in 2013.⁴³⁰ Year on year, the increasing majority of individuals who use the Helpline are concerned about internet offending.⁴³¹ To illustrate the type of individual who uses the Helpline, Denis and Whitehead provide the example of ‘Terry’, whose use of adult pornography sites led him to view, and continue viewing, CEM.⁴³²

An independent evaluation of Stop it Now! identified that it was effective in assisting adults to challenge and change behaviour that might represent a risk of sexual harm to children and young people.⁴³³ More recently, a study of Stop It Now! found that the ‘help and advice’ provided by the helpline service was a ‘promising tool’ within the primary prevention context with respect to child sexual abuse generally.⁴³⁴ Capturing this, John Carr from The Children’s Charities’ Coalition on Internet Safety, makes the point that:

⁴²⁷ Donald Findlater, ‘Child Sexual Abuse: The Possibilities of Prevention’ in Arnon Bentovim and Jenny Gray (eds), *Eradicating Child Maltreatment: Evidence-Based Approaches to Prevention and Interventions Across Services* (Jessica Kingsley Publishers, 2015) 197.

⁴²⁸ Deborah Denis and Hannah Whitehead, ‘Stop it Now! UK & Ireland Helpline and Campaign Report 2002–2012: 10 Year Anniversary Edition’ (Lucy Faithful Foundation 2012) 11.

⁴²⁹ Stop it Now! UK & Ireland, ‘Child Sexual Abuse Helpline Missing Four Times the Number of Calls it is Taking’ (Lucy Faithful Foundation, 2014) <https://www.stopitnow.org.uk/files/051414_child_sexual_abuse_helpline_missing_four_times_the_number_of_calls_its_taking1.pdf>.

⁴³⁰ Findlater, above n 427, 196.

⁴³¹ Denis and Whitehead, above n 428, 12.

⁴³² Ibid 14.

⁴³³ Ashley Brown et al, ‘Call to keep children safe from sexual abuse: A study of the use and effects of the Stop it Now! UK and Ireland Helpline’ (NatCen Social Research, Crime and Justice Team, 2014) 66.

⁴³⁴ Joan Van Horn et al, ‘Stop It Now! A Pilot Study into the Limits and Benefits of a Free Helpline Preventing Child Sexual Abuse’ (2015) 24(8) *Journal of Child Sexual Abuse* 853, 867.

To hardened technology-sophisticated, technology-literate paedophiles, these [warning messages] will probably make very little difference ... But there is a very large number of men who perhaps have a marginal interest in this type of material and we need to stop them getting any further engaged with it.⁴³⁵

In Australia, after well over a decade of advocacy, Phoenix House — a Queensland based sexual violence advocacy charity — recently launched a limited version of the Stop It Now! program.⁴³⁶ For CEM, the Stop It Now Australia (Queensland) website provides access to a range of material on key topics including, ‘Is viewing child pornography child sexual abuse?’⁴³⁷ Yet, despite continued calls from advocates for Australian governments to invest in developing wrap around support services like helplines,⁴³⁸ no Australian based service currently offers the kind of specialist support available in the United Kingdom.⁴³⁹

It would be remiss not to acknowledge that there are limitations to investing in the Second Aim of primary prevention. An investment at this point is unlikely to have a significant impact on the amount of CEM in circulation, at least in the context of the Deep and Dark web (see, 1.3.2). Removing individuals who share low numbers of CEM files has little or no impact on the total number of files available.⁴⁴⁰ Yet, an investment at this point may reduce the total number of individuals who experience onset, given that it is unlikely that the bulk of first time offenders will go straight to the Dark Web, thereby diminishing the overall amount of CEM activity online.

Evidence indicates that there is widespread low-level sharing of CEM by a large percentage of computers, while only a small percentage of computers make a large contribution to the problem.⁴⁴¹ Thus, in addition to reducing the individual and

⁴³⁵ Technology Editorial, ‘Microsoft’s Bing Introduces Child Abuse Search Pop-ups’, *BBC News* (online), 27 July 2013 <<http://www.bbc.com/news/technology-23476089>>.

⁴³⁶ Phoenix House, *Stop It Now* Phoenix House <<https://www.phoenixhouse.com.au/index.php/programmes-and-services/stop-it-now>>.

⁴³⁷ Stop It Now!, *FAQs About Child Sexual Abuse* <<http://www.stopitnow.org/help-guidance/faqs>>.

⁴³⁸ See, eg, Nick Whigham, ‘Experts are calling for prevention strategies for paedophilia, so why is no one listening?’, *news.com.au* (online) 18 July 2015 <<http://linkis.com/www.news.com.au/life/a2itk>>.

⁴³⁹ Stop It Now!, *Get Help Now! Stop It Now!* <<http://www.stopitnow.org/help-guidance/get-help-now>>.

⁴⁴⁰ Wolak, Liberatore and Levine, above n 120, 354.

⁴⁴¹ Ibid.

societal costs associated with CEM offending, focusing on the Second Aim of primary prevention may help to focus and facilitate the allocation of resources within the sphere of tertiary prevention (e.g., costs to law enforcement and the criminal justice system more broadly).⁴⁴²

As a final note, and to foreshadow Chapter 5, in Australia there is a possible exception to the general dearth of activity under the Second Aim of primary prevention identified above. This exception takes the form of the remarks made by judges when they sentence an offender (see, 5.2). In examining a sample of sentencing remarks, Chapter 5 investigates whether, further to merely indicating the criminality of viewing CEM per se, judges' sentencing remarks contain normative messages that have an educative value for the community. For this chapter, the relevance of this investigation turns on the fact that if remarks contain such messages, this may be an indicator that the policy blind spot is not quite as large as suggested. That said, the likelihood that normative messages contained in sentencing remarks are an effective means through which to reach, let alone influence, someone at risk of onset is probably an unrealistic expectation and perhaps no more than wishful thinking (see, Chapter 5).

3.4 THREE ARGUMENTS FOR ADDRESSING THE SECOND AIM OF PRIMARY PREVENTION

Within the sphere of primary prevention, the plethora of initiatives under the First Aim mask a policy blind spot signifying that other — or perhaps more accurately 'further'⁴⁴³ — potentially valuable opportunities to tackle CEM offending may be overlooked. The following part sets out three arguments that, by addressing the questions of 'how', 'why' and 'who', build a case for adjusting the policy focus to include the Second Aim of primary prevention.

⁴⁴² John Roman and Graham Farrell, 'Cost-Benefit Analysis for Crime Prevention: Opportunity Costs, Routine Savings and Crime Externalities' (2002) 14 *Crime Prevention Studies* 53, 67.

⁴⁴³ Stephen Smallbone and Richard Wortley, 'Preventing Child Sexual Abuse Online' in Jon Brown (ed), *Online Risk to Children Impact, Protection and Prevention* (John Wiley & Sons, 2017) 143.

3.4.1 The How Question – Paths to Offending

Targeting onset to prevent offending has wide appeal.⁴⁴⁴ It is based on the theory that, at the point of crime commission (or just before) it is easier to deter a potential offender than at any other point in an offending trajectory.⁴⁴⁵ At this point, an offender's demand for the criminal opportunity is described as more 'elastic',⁴⁴⁶ as their motivation to offend is weaker than that of an experienced offender.

For online CEM offending, the value of targeting onset turns on the idea that deliberately viewing CEM for the first time involves overcoming a 'significant psychological threshold'.⁴⁴⁷ Wortley and Smallbone state that 'targeted interventions designed to deter potential or novice users at the point at which they first search for or encounter [CEM] may be particularly effective'.⁴⁴⁸

This is also conceptualised as the idea that some CEM offenders may be particularly responsive to initiatives that heighten (or maintain) inhibitions for offending.⁴⁴⁹ Despite this, and the observation that 'beginners who may be curious about [CEM]' make up a large proportion of offenders,⁴⁵⁰ there is a lack of research examining onset — the question of 'how' offending begins.⁴⁵¹ The limited research suggests that opportunities for onset may occur during a number of online activities, including searching and viewing adult pornography, and using P2P networks.

⁴⁴⁴ Smallbone, Marshall and Wortley, above n 385, 65.

⁴⁴⁵ Findlater, above n 427, 192 (making the point that 'diverting a "situational" offender from committing a crime is likely to be an easier task than preventing the same crime by a determined offender').

⁴⁴⁶ Roman and Farrell, above n 442, 67.

⁴⁴⁷ Wortley and Smallbone, above n 50, 121.

⁴⁴⁸ Ibid 94.

⁴⁴⁹ Sandy Jung et al, 'Child Pornography Possessors: Comparisons and Contrasts with Contact- and Non-contact Sex Offenders' (2013) 19(3) *Journal of Sexual Aggression* 295, 308.

⁴⁵⁰ Mary Aiken, Mike Moran and Mike J Berry, 'Child abuse material and the Internet: Cyberpsychology of online child related sex offending' (Paper presented at the INTERPOL Specialist Group on Crimes against Children, Lyons, France 5–7 September 2011) 6.

⁴⁵¹ Although, research indicate that individuals view CEM from a range of online platforms including personal computers, tablets and, increasingly, smartphones see, eg, Steel, above n 108, 155; Timothy Buzzell, 'The Effects of Organizational and Community Context on Local Prosecution of Computer Child Pornography Cases' (2007) 20(4) *Criminal Justice Studies* 391, 392.

Research suggests that proportions of adult pornography users will encounter CEM online — perhaps as much as 20 per cent.⁴⁵² This is concerning given that Merdian and colleagues found that among CEM offenders (n=22), ‘accidental exposure’ through adult pornography (n=4) was reported as a trigger for onset.⁴⁵³ Similarly, Winder and colleagues identified that CEM viewers explained initial encounters with CEM as ‘accidental’ during the viewing of adult pornography and as a result of such material appearing in ‘pop-ups’.⁴⁵⁴ One offender stated, ‘it was just purely by chance how I actually got started looking’.⁴⁵⁵

In a similar vein, Rimer identifies that a common narrative among online CEM offenders is that exposure to adult legal pornography leads them to view material involving younger and younger age groups.⁴⁵⁶ In this context, ‘curiosity’ is identified as a pivotal factor.⁴⁵⁷ Providing an anecdotal example of this, Denis and Whitehead report that a caller to a helpline described how after viewing adult pornography and following successive links, he began viewing CEM and ‘curiosity drove him back and it became a habit’.⁴⁵⁸ The danger of ‘embedded’ forms of CEM — such as where CEM is intermingled with legal pornography — is that, as Wortley and Smallbone observe, a potential offender may encounter the material when they are already aroused and their inhibitions lowered, thus increasing the risk of onset.⁴⁵⁹

The role of P2P networks in CEM offending is well established (see, 1.3.2). Brennan and Hammond describe how CEM offending has become ‘endemic’ to these

⁴⁵² James Ray, Eva R Kimonis and Michael C Seto, ‘Correlates and Moderators of Child Pornography Consumption in a Community Sample’ (2014) 26(6) *Sexual Abuse: A Journal of Research and Treatment* 523, 535 (although the authors point out that this was not a prevalence estimate of CEM consumption among online adult pornography users).

⁴⁵³ Hannah L Merdian et al, “‘So why did you do it?’”: Explanations provided by Child Pornography Offenders’ (2013) 8(1) *Sexual Offender Treatment* 1, 8.

⁴⁵⁴ Belinder Winder, Brendan Gough and Sarah Seymour-Smith, ‘Stumbling into Sexual Crime: The Passive Perpetrator in Accounts by Male Internet Sex Offenders’ (2015) 44(1) *Archives of Sexual Behaviour* 167, 174.

⁴⁵⁵ Ibid.

⁴⁵⁶ Johah R Rimer, ‘Internet Sexual Offending from an Anthropological Perspective: Analysing Offender Perceptions of Online Spaces’ (2017) 23(1) *Journal of Sexual Aggression* 33, 37.

⁴⁵⁷ Merdian et al, above n 453, 8.

⁴⁵⁸ Denis and Whitehead, above n 428, 14.

⁴⁵⁹ Wortley and Smallbone, above n 50, 120.

networks.⁴⁶⁰ Findings by Prichard and colleagues identify that the use of terms known to be associated with CEM appear ‘relatively’ consistently in the top 1000 search terms on the now defunct P2P network isoHunt.⁴⁶¹ According to the researchers, the prevalence of material on these networks may represent a potential risk for accidental exposure or even an opportunity for onset — a potential increased by the influence of subcultural norms within such networks.⁴⁶²

Going further, Quayle and colleagues point out that, especially when the viewing of CEM is used to avoid emotional mood states such as boredom, the behaviour is ‘highly reinforcing as accessing often culminates with masturbation’.⁴⁶³ The addictive nature of this type of offending is a common theme in the literature.⁴⁶⁴ Merdian and colleagues point out that greater involvement with CEM may make it ‘more difficult for the offender to disrupt established behavioural patterns’.⁴⁶⁵ Winder and Gough suggest continual viewing of CEM may lead to a progression to more extreme material, including that involving very young children or extreme sexual violence.⁴⁶⁶ Capturing the core concern, Wortley points out there is a risk that the order of causation may be inverted in the sense that ‘the act of viewing child pornography ignites and strengthens [an individual’s] sexual interest in children’, which may, in turn, result in continual offending.⁴⁶⁷

At this point, it must also be observed that emerging research suggests that in seeking to tackle onset, attention to more than just the viewing of material involving a real child is warranted. In 2017, Crookes and colleagues explored the perceptions of professionals who treat CEM offenders about ‘narrative child sexual exploitation

⁴⁶⁰ Brennan and Hammond, above n 121, 2.

⁴⁶¹ Jeremy Prichard et al, ‘Young People, Child Pornography, and Subcultural Norms on the Internet’ (2013) 64(5) *Journal of the American Society for Information Science and Technology* 992, 996.

⁴⁶² Ibid 997.

⁴⁶³ Ethel Quayle, Mary Vaughan and Max Taylor, ‘Sex Offenders, Internet Child Abuse Images and Emotional Avoidance: The Importance of Values’ (2006) 11(1) *Aggression and Violent Behavior* 1, 3; Sullivan, above n 8, 21.

⁴⁶⁴ Ethel Quayle and Max Taylor, ‘Child Pornography and the Internet: Perpetuating a Cycle of Abuse’ (2002) 23(4) *Deviant Behavior* 331, 355; Winder, Gough and Seymour-Smith, above n 454, 175.

⁴⁶⁵ Hannah L Merdian et al, ‘The Three Dimensions of Online Child Pornography Offending’ (2013) 19(1) *Journal of Sexual Aggression* 121, 129.

⁴⁶⁶ Winder, Gough and Seymour-Smith, above n 454, 174–175.

⁴⁶⁷ Richard Wortley, ‘Situational Prevention of Child Abuse in the New Technologies’ in Ribisl and Quayle (ed), *Preventing Online Exploitation of Children* (Routledge, 2012) 193.

material’ (NCEM).⁴⁶⁸ This research points to the possibility that viewing (or reading) NCEM may lead some individuals to view images involving real children.⁴⁶⁹ The researchers found some professionals believe, based on their experience, that NCEM is ‘more harmful’ than images of a real child because it reinforces cognitive distortions and generates fantasies.⁴⁷⁰ A view apparently shared by some detected users of CEM.⁴⁷¹ To that end, reflecting on the function of NCEM in an offending trajectory (or ‘offending cycle’), Crookes and colleagues proposed it may function as a ‘mediator between the material and potentially subsequent offending behaviour’;⁴⁷² although they also emphasised that the quantum of the risk for use of NCEM was ‘moderated by individual factors’.⁴⁷³

As noted previously, under federal legislation, written material is definable as CEM subject to the relevant test (see, 1.2.4). This means that reference to onset in this thesis, in theory, captures the reading of such material. This research underlines the potential for onset to occur, and thus CEM offending beginning through other — perhaps overlooked — types of CEM. The significance of this is returned to later in this thesis (see, Chapter 7).

⁴⁶⁸ Rebecca L Crookes, Hannah L Merdian and Charlotte L Hassett, “‘So what about the stories?’”An exploratory Study of the Definition, Use, and Function of Narrative Child Sexual Exploitation Material’ (2017) 23(2) *Psychology, Crime & Law* 171, 172 (defining NSCEM as predominately text-based material including ‘written stories or poems, sometimes recorded as audio tapes or depicted as cartoons, describing sexual encounters involving minors’). Recent Australian examples of prosecutions involving a range of CEM offences where the material is textual, or narrative CEM, include: *Director of Public Prosecutions v Latham* [2009] TASSC 101; *Holland v The Queen* [2005] WASCA 140; *DPP v Bayliss* [2012] VCC 1369; *Godfrey v The Queen* [2013] WASCA 247; *Whiley v R* [2010] NSWCCA 53; *Taylor v The Queen* [2015] TASCCA 7; *Bester v Barnes* [2016] TASSC 19.

⁴⁶⁹ Crookes, Merdian and Hassett, above n 468, 175; Kogilavani Kunasegaran et al, ‘Narrative Child Sexual Exploitation Material (NCSEM): NCSEM Functions and Offence Pathways Model’ (Paper presented at the British Psychological Society Division of Forensic Psychology Annual Conference, Bristol, United Kingdom, 14th June 2017).

⁴⁷⁰ Crookes, Merdian and Hassett, above n 468, 178.

⁴⁷¹ *Ibid.*

⁴⁷² *Ibid* 176.

⁴⁷³ *Ibid* 177.

3.4.2 The Why Question – A Diversity of Offending Motivations

There is no primary explanation for the motivations of online CEM offenders generally, or why someone deliberately chooses to view CEM in the first place.⁴⁷⁴ Typological accounts suggest the motivations of CEM offenders are heterogeneous, with different motives implicated along a continuum, extending from a sexual interest in children to mere curiosity.⁴⁷⁵ The typology proposed by Merdian and colleagues provides a recent example. Under this model, CEM offending is conceptualised as a three-dimensional model comprised of offending type, motivation and the degree of ‘social engagement’ involved.⁴⁷⁶ Underlining the value of this conceptualisation, Merdian and colleagues propose that ‘[d]ifferent combinations of these dimensions will define subgroups of [CEM] offenders and aid in describing different risk groups’.⁴⁷⁷

Under the first dimension, the researchers distinguish between individuals who use CEM ‘as a form of fantasy-driven offending’ (*fantasy-driven*) and those who use such material ‘as part of contact sexual abuse’ (*contact-driven*).⁴⁷⁸ Preliminary exploratory research provides support for this conceptual distinction.⁴⁷⁹ Within the *fantasy-driven* offender type, the second dimension of this framework draws on empirical evidence and other prominent typologies, including those proposed by Lanning,⁴⁸⁰ Wortley and Smallbone,⁴⁸¹ Taylor,⁴⁸² and Beech and colleagues.⁴⁸³ Merdian and colleagues identify a four-pronged classification, extending from offenders who have a ‘paedophilic

⁴⁷⁴ Deniz Aslan, ‘Critically Evaluating Typologies of Internet Sex Offenders: A Psychological Perspective’ (2011) 11(5) *Journal of Forensic Psychology Practice* 406, 426.

⁴⁷⁵ Michael C Seto, Lesley Reeves and Sandy Jung, ‘Explanations Given by Child Pornography Offenders for Their Crimes’ (2010) 16(2) *Journal of Sexual Aggression* 169, 176.

⁴⁷⁶ Merdian et al, above n 465, 125–129.

⁴⁷⁷ Ibid 125.

⁴⁷⁸ Ibid.

⁴⁷⁹ Ross M Bartels and Hannah L Merdian, ‘The Implicit Theories of Child Sexual Exploitation Material Users: An Initial Conceptualization’ (2016) 26 *Aggression and Violent Behavior* 16, 17.

⁴⁸⁰ Kenneth V Lanning, ‘Child Molesters and Cyber Paedophiles: A Behavioural Perspective’ in Robert R Hazelwood and Anne Wolbert Burgess (eds), *Practical Aspects of Rape Investigation: A Multidisciplinary Approach* (CRC Press, 3rd ed, 2001) 205.

⁴⁸¹ Richard Wortley and Stephen Smallbone, ‘Child Pornography on the Internet’ (United States Department of Justice: Office of Community Oriented Policing Services, 2006) 14–15.

⁴⁸² Max Taylor, ‘The Nature and Dimension of Child Pornography on the Internet’ (Paper presented at the International Conference Combating Child Pornography on the Internet, Vienna, Austria, 1999).

⁴⁸³ Beech et al, above n 60, 226.

motivation’, to those with a ‘general deviant sexual interest’ (not limited to children), those who have a ‘financial motivation’, and lastly, those who fall into the ‘Other’ category, including ‘users whose motivation to access [CEM] is based on other reasons, such as curiosity or moral considerations.’⁴⁸⁴

While not considered in detail here, the third dimension of this typology references the idea that as the level of child sexual exploitation increases, so too does the degree of social involvement with other offenders.⁴⁸⁵ Further to this general observation, Krone suggests that the increasing seriousness of offending may go hand-in-hand with an increasing use of online security; whereas a ‘Browser’ may use no security, a ‘Secure Collector’ uses encryption services to ensure anonymity.⁴⁸⁶

Arguably, the diversity of motivations implicated in CEM offending underlines the importance of a prevention approach that recognises, and is sensitive to, the existence of different offender types. This point assumes further significance still when considered together with research suggesting situational and environmental factors may have a ‘greater impact’ on an individual’s likelihood to view CEM than pathological motivations or drivers (e.g., overpowering sexual urges).⁴⁸⁷ Typifying this, Wortley and Smallbone claim that demand for CEM — the desire to ‘consume’ or view CEM — is ‘supply-led’.⁴⁸⁸ In other words, the internet is not merely providing a ‘passive platform’ through which highly motivated individuals can view CEM in ways they would have anyway, but the internet instead plays a causative role in facilitating onset for new groups.⁴⁸⁹

3.4.3 The Who Question – Individuals at Risk of Onset

Identifying individuals who are at risk of onset is difficult because neither those involved with the criminal justice system, referred to as *Detected Offenders*, nor those

⁴⁸⁴ Merdian et al, above n 465, 127.

⁴⁸⁵ Ibid 127.

⁴⁸⁶ Krone, above n 89, 4.

⁴⁸⁷ Ian A Elliott et al, ‘Psychological Profiles of Internet Sexual Offenders: Comparisons with Contact Sexual Offenders’ (2009) 21(1) *Sexual Abuse* 76, 89.

⁴⁸⁸ Wortley and Smallbone, above n 50, 3.

⁴⁸⁹ Ibid 14.

who self-report viewing behaviour, referred to as *Undetected Offenders*, appear to possess distinguishing demographic characteristics (see, *Table 2* below).

Table 2 — A summary of the key demographic characteristics of Detected and Undetected CEM offenders

Characteristic	Detected Offenders	Undetected Offenders
Sex	Majority are male, although most research examines male convenience samples. ^(1, 2, 3, 4, 5) Criminal justice statistics indicate that offenders from the US, ^(6, 7) NZ ^(8,18) and the UK ^(9, 10, 19) are male.	More than double the number of males report using CEM compared to females. ^(11, 12)
Ethnicity	Most of offenders (+80%) are white or Caucasian. ^(6, 2, 4, 8, 5, 9, 10) Some indication that an increasing number of individuals from minority groups are being detected. ⁽⁶⁾	While predominately white, the ethnicity profile of undetected offenders appears to be more diverse. ^(11, 12, 13)
Age	Offenders are middle aged (late 30s to mid 40s). ^(6, 1, 2, 3, 4, 8, 5, 9, 10, 14, 15, 16)	Studies indicate an age range from late 20s to mid-30s. ⁽¹¹⁾⁽¹²⁾⁽¹³⁾
Education	Approximately a third of offenders are reasonably well educated, measured both by level of tertiary education ^(6, 1, 5, 10) and years in education. ^(3, 17, 16)	Higher levels of education. ^(11, 12)
Employment	More than half had employment. ^(7, 10, 19)	No research examining employment but evidence of annual income suggests that more than half had employment. ⁽¹¹⁾
Relationship status	More offenders are single than married or in a relationship. ^(7, 2, 5, 10, 14 c.f. 19)	More offenders are single than married or in a relationship. ^(11, 12, 13)
Prior criminality	Most offenders appear not to have a criminal history for offences other than viewing CEM ⁽¹⁹⁾	Not available.
<i>See Reference List p. 94</i>		

As this table shows, the *Detected Offender* cohort is comprised of men who are predominately single, white, in their late 30s to early 40s, educated, employed and unlikely to have a criminal record, or minor offences only (see, *Table 2*). Moreover, while the evidence is more limited, the *Undetected Offender* cohort is similarly constituted, albeit perhaps younger and better educated than the former (see, *Table 2*).

Despite the fact that a number of issues complicate this examination, as recently summarised by Henshaw and colleagues,⁴⁹⁰ the point remains that, as Harrison puts it,

⁴⁹⁰ Marie Henshaw, James R P Ogloff and Jonathan A Clough, 'Looking Beyond the Screen: A Critical Review of the Literature on the Online Child Pornography Offender' (2017) *Sexual Abuse: A Journal of Research and Treatment* 1, 4.

many offenders are seemingly ‘normal men in normal families’.⁴⁹¹ Commenting on this phenomenon, Wortley and Smallbone observe that ‘it is the ordinary rather than the unusual characteristics of these offenders that is striking’.⁴⁹² In other words, the viewing of CEM is not limited to a particular demographic subgroup of the community, rather, the potential for onset may be spread across the community.

Further substantiating this point, empirical studies of the general population, as opposed to offender groups, provide some support for what might be called the mainstreaming of viewing behaviours.⁴⁹³ For example, in 2003, a Scandinavian study of men aged between 17–20 years old (N=1978) found that 4.2 per cent of participants reported that they watched CEM.⁴⁹⁴ Five years later, a United States study of anonymous internet users (N=307) found that 9.8 per cent reported having ‘knowingly’ searched for, accessed, downloaded or shared CEM.⁴⁹⁵ More recently, a large study of German men (N=8718) found that 2.4 per cent of participants admitted viewing CEM.⁴⁹⁶

Despite limitations around the reliability of self-reports, these studies suggest that between two and 10 per cent of the population admit to CEM offending, with higher rates where such reports are anonymous. Studies also tend to suggest that some groups are much more likely to report viewing CEM. For example, a 2014 study of

⁴⁹¹ Christine Harrison, ‘Cyberspace and Child Abuse Images: A Feminist Perspective’ (2006) 21(4) *Affilia* 365, 368.

⁴⁹² Wortley and Smallbone, above n 50, 45.

⁴⁹³ See also Crookes, Merdian and Hassett, above n 468, 171 (suggesting that ‘[a]ccessing CSEM may potentially be more normative than previously assumed’); Wortley and Smallbone, above n 50, 49 (describing how the internet has ‘pushed the problem of child pornography further into the normal population’); Bryce G Westlake, Martin Bouchard and Richard Frank, ‘Finding the Key Players in Online Child Exploitation Networks’ (2011) 3(2) *Policy & Internet* 1, 24.

⁴⁹⁴ Michael Seto et al, ‘Sexual Coercion Experience and Sexually Coercive Behavior: A Population Study of Swedish and Norwegian Male Youth’ (2010) 15(3) *Child Maltreatment* 219, 222.

⁴⁹⁵ Kathryn C Seigfried, Richard W Lovely and Marcus K Rogers, ‘Self-Reported Online Child Pornography Behavior: A Psychological Analysis’ (2008) 2(1) *International Journal of Cyber Criminology* 286, 291.

⁴⁹⁶ Beate Dombert et al, ‘How Common is Men’s Self-Reported Sexual Interest in Prepubescent Children?’ (2016) 53(2) *The Journal of Sex Research* 1, 5.

self-identified adult male pornography users (N=175) found that more than one in five participants admitted viewing CEM.⁴⁹⁷

In another study of internet users (N=435), almost one in 10 males (9.2%) reported that it was likely that they would view CEM online; a much smaller proportion of females indicated as such (3.5%).⁴⁹⁸ While there is a lack of Australian research, these studies fit with the recent observation by Australian law enforcement that the ‘societal appetite for child sexual exploitation material is increasing’.⁴⁹⁹

3.5 ADDRESSING THE PUBLIC POLICY BLIND SPOT – A SITUATIONAL APPROACH

Against this background, this part introduces Situational Crime Prevention theory (SCP) which, as Clarke explains, takes the perspective that:

crime is an act, not merely a propensity, and it can only be explained in terms of the interaction between the disposition (sometimes also called ‘criminal motivation’) and the situation that provides the opportunity for crime to occur.⁵⁰⁰

That is, the interaction between person and situation. In this context, SCP is traditionally defined by reference to the opportunity-reduction model of crime prevention, which concentrates on the need to reduce the opportunity for crime and systematically increase the perception of risk through a range of methods.⁵⁰¹ Over the years since its inception, the scope of SCP has gradually expanded to include strategies that are not strictly methods of opportunity reduction, including ‘removing excuses’ and ‘reducing provocations’.⁵⁰²

⁴⁹⁷ Ray, Kimonis and Seto, above n 452, 535 (although the authors point out that this was not a prevalence estimate of CEM consumption among online adult pornography users).

⁴⁹⁸ Sandy K Wurtele, Dominique A Simons and Tasha Moreno, ‘Sexual Interest in Children Among an Online Sample of Men and Women: Prevalence and Correlates’ (2014) 26(6) *Sexual Abuse: A Journal of Research and Treatment* 546, 557.

⁴⁹⁹ Australian Federal Police, ‘Annual Report 2015–16’ (Commonwealth of Australia, 2016) <<https://www.afp.gov.au/sites/default/files/PDF/Reports/afp-annual-report-2015-2016.pdf>> 47.

⁵⁰⁰ Ronald V Clarke, ‘Situational Crime Prevention’ in Richard Wortley and Lorraine Mazerolle (eds), *Environmental Criminology and Crime Analysis* (Taylor and Francis, 2013) 178.

⁵⁰¹ Ronald V Clarke, ‘Situational Crime Prevention: Its Theoretical Basis and Practical Scope’ (1983) 4 *Crime and Justice* 225, 225; Ronald V Clarke, ‘Situational Crime Prevention’ (1995) 19 *Crime and Justice* 91, 91.

⁵⁰² Wortley, above n 467, 200.

Clarke explains that the inclusion of ‘removing excuses’ recognises that ‘offenders make judgments about the morality of their own behaviour and frequently rationalize their conduct to ‘neutralize’ what would otherwise be incapacitating feelings of guilt or shame’.⁵⁰³ In turn, ‘reducing provocations’ incorporates Wortley’s assertion that the opportunity-reduction model does not provide a full account of the ‘situational crime prevention story’.⁵⁰⁴ Wortley argues that crime prevention should also focus prior to the opportunity stage where situational forces — ‘precipitators’ — ready the potential offender for crime.⁵⁰⁵ Acknowledging this, Clarke states that Wortley’s work on precipitators has ‘enhanc[ed] the scope of situational prevention’.⁵⁰⁶ Today, SCP encompasses twenty-five techniques that align with five key strategies which, in brief, involve increasing the perceptions of the effort and risk associated with offending, reducing the rewards of and the provocations for offending and removing excuses.⁵⁰⁷

The original target of SCP was an ‘unidentified offender’.⁵⁰⁸ In practice, this meant a ‘one-size-fits all’ approach was taken to designing crime prevention.⁵⁰⁹ This was undergirded by a range of ‘pragmatic as much as theoretical considerations’ that formed ‘default assumptions’ about the crimes which were most applicable, the ‘nature of offenders’ and the origins and progression of their motivation to offend — among others.⁵¹⁰

⁵⁰³ Ronald V Clarke, *Situational Crime Prevention Successful Case Studies* (Harrow and Heston Publishers, 2nd ed, 1997) 16.

⁵⁰⁴ Richard Wortley, ‘A Classification of Techniques for Controlling Situational Precipitators of Crime’ (2001) 14(4) *Security Journal* 63, 63.

⁵⁰⁵ Richard Wortley, ‘Situational Precipitators of Crime’ in Richard Wortley and Lorraine Mazerolle (eds), *Environmental Criminology and Crime Analysis* (Routledge, 2013) 48, 49.

⁵⁰⁶ Clarke, above n 500, 178–179.

⁵⁰⁷ Derek B Cornish and Ronald V Clarke, ‘Opportunities, Precipitators and Criminal Decisions: A Reply to Wortley’s Critique of Situational Crime Prevention’ (2003) 16 *Crime Prevention Studies* 41 90.

⁵⁰⁸ Ibid 56.

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid 54 (‘views about the crimes most worth tackling, the nature of offenders, the sources and development of their motivation, the use they made of situations and situational cues, the processes of criminal decision making they engaged in, and the most appropriate situational techniques for disrupting their criminal activities’).

Yet, in response to the application of SCP to an increasingly diverse range of offenders and crimes, modifications to the default assumptions are now recognised.⁵¹¹ To differentiate between these assumptions, Cornish and Clarke advance the notion of ‘ideal types’.⁵¹² The original (or ‘default’) offender is the ‘Anti-Social Predator’.⁵¹³ This offender is ‘free from moral scruples’⁵¹⁴ and ‘impervious to appeals to the pangs of conscience’.⁵¹⁵ For this type of offender, only SPC methods that ‘attempt to disrupt instrumental aspects of the crime-commission process’ are likely to be effective (e.g., increasing the effort (target hardening) and increasing the perception of risk).⁵¹⁶

The ‘Mundane Offender’ now joins the Anti-Social Predator — although the term ‘Opportunistic Offender’ is preferred to avoid ‘trivializ[ing]’ the conduct involved.⁵¹⁷ As the name suggests, the offending of the Opportunistic Offender may be intermittent or persistent, but above all, it is opportunistic.⁵¹⁸ In describing this offender type, Cornish and Clarke state that such offenders are ‘basically law-abiding’ with ‘[a] conscience and a stake in society’.⁵¹⁹ Therefore, a distinguishing feature of this offender type is that they ‘feel the need to “make excuses” for their conduct’.⁵²⁰

The final, and most recent, offender type is the ‘Provoked Offender’,⁵²¹ who is vulnerable to ‘pressures’ and ‘provocations’.⁵²² The vulnerability of this type of

⁵¹¹ Ibid 79; Wortley and Stephen above n 481, 15; Aiden Sidebottom and Richard Wortley, ‘Environmental Criminology’ in Alex R Piquero (ed), *The Handbook of Criminological Theory* (Wiley Blackwell, 2016) 172–173.

⁵¹² Cornish and Clarke, above n 507, 56.

⁵¹³ Ibid 56; Derek B Cornish and Ronald V Clarke, ‘The Rationale Choice Perspective’ in Richard Wortley and Lorraine Mazerolle (eds), *Environmental Criminology and Crime Analysis* (Taylor and Francis, 2008) 39.

⁵¹⁴ Cornish and Clarke, above n 507, 57.

⁵¹⁵ Ibid 95.

⁵¹⁶ Ibid 61.

⁵¹⁷ Richard Wortley and Stephen Smallbone, ‘Applying Situation Principles to Sexual Offenses against Children’ in Richard Wortley and Stephen Smallbone (eds), *Situational Prevention of Child Sexual Abuse*, Crime Prevention Studies (Lynne Rienner Publishers, 2006) 15; Cf Cornish and Clarke, above n 507, 62.

⁵¹⁸ Cornish and Clarke, above n 507, 63.

⁵¹⁹ Ibid 62.

⁵²⁰ Ibid 63.

⁵²¹ Ibid 69.

⁵²² Ibid 76; Wortley, above n 505, 59.

offender turns on whether he or she is ‘precipitated’ to offend, which, conceptualised as ‘reactivity’, in turn, is mediated by a weighing up of the particular undertaking.⁵²³

The value of distinguishing between these offender types, or more correctly, the assumptions that underlie them, assists the design of prevention initiatives.⁵²⁴ And, while there is a recognised ‘danger’ in this development, as SCP ‘explicitly confines its attention to situational determinates of offending’, Cornish and Clarke state that there is ‘an equal danger in ignoring assumptions about their nature that might lie hidden behind this activity’.⁵²⁵

For this chapter, identifying the assumptions that inform or comprise each offender type turns on the opportunity it offers to improve the efficacy of onset prevention initiatives.⁵²⁶ Alternatively, and to use SCP language, offender type can inform the ‘mode’ in which SCP is run.⁵²⁷ Reference to ‘mode’ analogises SCP to, as Cornish and Clarke explain, a ‘computer program capable of operating with a series of possible settings that allows it to run in different modes’.⁵²⁸ This refinement to SCP recognises that offenders are not homogeneous and that the role that the situation plays will change (although not diminish) depending on offender type.⁵²⁹

In the following part, attention focuses on the Opportunistic Offender, whose particular vulnerabilities make this offender type especially relevant to the broader discussion of public perceptions in this thesis.

3.6 A MISSED OPPORTUNITY FOR PREVENTION?

According to theory, to offend, an Opportunistic Offender must release himself (or herself) from ‘moral scruples’ or his (or her) ‘conscience’ — that is, the ‘the ability to

⁵²³ Cornish and Clarke, above n 507, 69.

⁵²⁴ Ibid 56 (explaining, that the purpose is ‘the development of techniques intended to address the special problems they pose for situational crime prevention’).

⁵²⁵ Ibid.

⁵²⁶ Wortley, above n 505, 59.

⁵²⁷ Cornish and Clarke, above n 507, 79.

⁵²⁸ Ibid.

⁵²⁹ Richard Wortley, *Psychological Criminology: An Integrative Approach*, Crime Science Series (Routledge, 2011) 206.

feel guilt or shame’ for the act.⁵³⁰ Of note, from this perspective, and informing the focus on onset, ‘the influence of moral scruples is likely to be greatest when questions of readiness to offend are determined’.⁵³¹ The absence of such scruples is conceptualised as the presence of ‘excuses’ and/or ‘permissions’⁵³² that can ‘weaken moral prohibitions’ against proscribed behaviours.⁵³³ As Sidebottom and Wortley explain, in effect, this process ‘permit[s] the performance of normally proscribed acts’.⁵³⁴

With respect to online CEM offending, concern about the role ‘excuses’ may play in offending onset marries with empirical literature about ‘cognitive distortions’.⁵³⁵ Admittedly, debate about the role of cognitive distortions in the etiology of offending generally — that is, whether they are causal or consequential to offending — continues.⁵³⁶ That said, researchers posit that internet CEM offenders may utilise a range of ‘offence supportive cognitions’ which, as Bartels and Merdian recently concluded, are likely to:

occur at every stage of the offending process, and fulfil different functions for the offending behaviour; either by initiating the behaviour in reducing internal inhibitions towards first time offending or by maintaining the reinforcement experience through the offending behaviour in suppressing cognitive dissonance.⁵³⁷

This description resonates with SCP, wherein the moral ambiguity of an offence is a factor that can make it ‘easier’ for the Opportunistic Offender to excuse their behaviour and offend.⁵³⁸ Another relevant factor is the degree of ambiguity around the

⁵³⁰ Cornish and Clarke, above n 507, 62–63.

⁵³¹ Ibid 67.

⁵³² Wortley, above n 504, 75 (stating that the theoretical foundation of ‘excuses’ and ‘permissions’ is ‘essentially the same’).

⁵³³ Ibid 65.

⁵³⁴ Sidebottom and Wortley, above n 511, 173.

⁵³⁵ Caoilte Ó Ciardha and Tony Ward, ‘Theories of Cognitive Distortions in Sexual Offending: What the Current Research Tells Us’ (2013) 14(1) *Trauma Violence Abuse* 5, 6 (providing a ‘rough working definition’ of cognitive distortions as ‘specific or general beliefs/attitudes that violate commonly accepted norms of rationality, and which have been shown to be associated with the onset and maintenance of sexual offending’).

⁵³⁶ Shadd Maruna and Ruth E Mann, ‘A Fundamental Attribution Error? Rethinking Cognitive Distortions’ (2006) 11 *Legal and Criminological Psychology* 155.

⁵³⁷ Bartels and Merdian, above n 479, 17.

⁵³⁸ Cornish and Clarke, above n 507, 67.

prohibition itself. For, as Wortley explains, the Opportunistic Offender is most likely to commit offences that have ‘ambiguous criminality’.⁵³⁹ A key indicator of such offences are those where the ‘criminal status is still widely contested’ and where the behaviour is perceived as ‘anti-social’ rather than serious or ‘strictly criminal’.⁵⁴⁰

The critical point, from a SCP perspective, is that unless an Opportunistic Offender is able to divest him or herself of moral scruples, his or her ‘readiness’ to offend will remain ‘qualified’.⁵⁴¹ Translated into the CEM context, this may mean the degree of ambiguity around morality and criminality of viewing CEM affects the likelihood of an individual choosing to view CEM for the first time — that is, experience onset.

There is a lack of empirical research examining online CEM offenders’ knowledge of the law.⁵⁴² There is however a growing body of evidence about the kinds of ‘excuses’ or cognitive distortions that may be associated with CEM offending, which — in addition to measures of sexual deviancy⁵⁴³ (and less clearly, victim empathy)⁵⁴⁴ — the psychological literature has identified as relevant to online CEM offenders.⁵⁴⁵

⁵³⁹ Ibid 62.

⁵⁴⁰ Ibid.

⁵⁴¹ Ibid 67.

⁵⁴² Although there is evidence about a lack of knowledge among some groups see Kath Albury and Kate Crawford, ‘Sexting, Consent and Young People’s Ethics: Beyond Megan’s Story’ (2012) 26(3) *Continuum* 463, 469; Kath Albury et al, ‘Young People and Sexting In Australia: Ethics, Representation and the Law’ (ARC Centre for Creative Industries and Innovation, Journalism and Media Research Centre, The University of New South Wales, 2013) <http://www.youthsexuality.com.au/files/6914/2923/0780/UNSW_2013-Young_People_And_Sexting_Final1.pdf> 12.

⁵⁴³ Kelly M Babchishin, Karl Hanson and Heather VanZuylen, ‘Online Child Pornography Offenders are Different: A Meta-Analysis of the Characteristics of Online and Offline Sex Offenders Against Children’ (2015) 44(1) *Archives of Sexual Behaviour* 45, 50; Henshaw, Ogloff and Clough, above n 490, 14; Marie Henshaw, James R P Ogloff and Jonathan A Clough, ‘Demographic, mental health, and offending characteristics of online child exploitation material offenders: A comparison with contact-only and dual sexual offenders’ (2017) 36(2) *Behavioral Sciences and the Law* 198.

⁵⁴⁴ Babchishin, Hanson and VanZuylen, above n 543, 54; Ian A Elliott et al, ‘Psychological Profiles of Internet Sexual Offenders: Comparisons with Contact Sexual Offenders’ (2009) 21(1) *Sexual Abuse* 76, 80; Cf Janina Neutze et al, ‘Predictors of Child Pornography Offenses and Child Sexual Abuse in a Community Sample of Pedophiles and Hebephiles’ (2011) 23(2) *Sexual Abuse* 212, 222; Bartels and Merdian, above n 479, 21.

⁵⁴⁵ With respect to onset, these other measures, particularly sexual deviancy may be somewhat problematic as the research focuses on individuals who, in all likelihood, have been offending for some time meaning that while such research has clear value for the development of treatment programs for offenders, its value in terms of insight into how to prevent onset is less clear.

The research suggests online only CEM offenders endorse fewer cognitive distortions compared to other types of sexual offenders.⁵⁴⁶ This includes online CEM offenders who Merdian and colleagues describe as *contact-driven*.⁵⁴⁷ Yet the research also indicates these online offenders appear to endorse offense specific distortions, including beliefs minimising and/or denying the effect or harm to children from viewing CEM online.

For instance, early research by Howitt and Sheldon found that, in comparison to internet only CEM offenders, contact child sex offenders agreed significantly more with distortions minimising the harmfulness of their behaviour (e.g., '[j]ust looking at a naked child is not as bad as touching and will not affect the child as much').⁵⁴⁸ In a similar vein, Winder and Gough found that CEM offenders convicted of the possession and/or distribution of CEM (N=36), put considerable effort into distancing themselves from the victims of CEM. Examples include emphasising the lack of contact (e.g., '[a]h, but I didn't touch anybody – that's my defence')⁵⁴⁹ and downplaying the severity of their behaviour by asserting that the material itself was 'mundane and innocuous' (e.g., '[t]hey're enjoying it, they're having fun, nobody's getting harmed – they're only pictures').⁵⁵⁰ Merdian and colleagues reported that internet-only CEM offenders (N=22), in general, tended to endorse offence specific cognitive distortions.⁵⁵¹ For example, 36 per cent of CEM offenders in their study endorsed the statement '[j]ust looking at a naked child is not as bad as touching and will probably not affect the child as much' and 23 per cent of their sample endorsed the statement '[s]exual thoughts about a child are not that bad because it does not really hurt the child'.⁵⁵²

⁵⁴⁶ Elliott et al, above n 487, 87.

⁵⁴⁷ Merdian et al, above n 465, 127.

⁵⁴⁸ Dennis Howitt and Kerry Sheldon, 'The Role of Cognitive Distortions in Paedophilic Offending: Internet and Contact Offenders Compared' (2007) 13(5) *Psychology, Crime & Law* 469, 478–479.

⁵⁴⁹ Belinder Winder and Brendan Gough, "I never touched anybody—that's my defence": A Qualitative Analysis of Internet Sex Offender Accounts' (2010) 16(2) *Journal of Sexual Aggression* 125, 129.

⁵⁵⁰ *Ibid* 129–130.

⁵⁵¹ Hannah L Merdian et al, 'The Endorsement of Cognitive Distortions: Comparing Child Pornography Offenders and Contact Sex Offenders' (2014) 20(10) *Psychology, Crime & Law* 971, 988.

⁵⁵² *Ibid* 979.

More recently, Kettleborough and Merdian explored the ‘permission-giving thoughts’ of users and distributors of CEM through a survey of professionals (e.g., psychologists and probation officers) who work with such offenders (N=16).⁵⁵³ Thematic analysis of participants’ responses identified a number of themes. For example, ‘Denial of harm’, which was defined as the idea that ‘[v]iewing [CEM] causes little harm to the children portrayed in [CEM] due to the offender having no direct physical contact’.⁵⁵⁴ The researchers also found support for the hypothesis that such offenders may ‘hold qualitatively different cognitions’ compared to other child sex offenders and that, as such, these cognitions may not have been captured in previous measures;⁵⁵⁵ although these findings need to be validated on a sample of offenders.⁵⁵⁶

Returning to theory, to ensure an Opportunistic Offender’s ‘readiness’ to offend remains ‘qualified’,⁵⁵⁷ the default SCP settings which target the Anti-Social Predator need to be, as Cornish and Clarke explain, amended by flicking the ‘moral scruples’ switch from ‘off’ to ‘on’.⁵⁵⁸ To switch moral scruples to ‘on’ requires the implementation of initiatives that reduce ambiguity; these could include strengthening the moral prohibition by challenging ‘excuses’ and clarifying rules.⁵⁵⁹ The significance of doing so for the Opportunistic Offender, according to Cornish and Clarke, is that:

If permissibility or excusability cues are present, these will allow offending to occur; [but] if inexcusability or impermissibility ones are there instead, they can abort or disrupt crime commission, or may even prevent it from being considered.⁵⁶⁰

⁵⁵³ Danielle G Kettleborough and Hannah L Merdian, ‘Gateway to Offending Behaviour: Permission-giving Thoughts of Online Users of Child Sexual Exploitation Material’ (2017) 23(1) *Journal of Sexual Aggression* 19, 22.

⁵⁵⁴ Ibid 24.

⁵⁵⁵ Ibid 28.

⁵⁵⁶ Ibid.

⁵⁵⁷ Cornish and Clarke, above n 507, 67.

⁵⁵⁸ Ibid 80.

⁵⁵⁹ Ibid 67.

⁵⁶⁰ Ibid 80.

In other words, the exposure of an Opportunistic Offender to permissibility and excusability cues may ‘clinch [an offender’s] readiness to offend’,⁵⁶¹ and they will experience onset. If this is the case, what might the relevance of the purported disjuncture (see, 1.4) between public perceptions and this area of law be?

3.6.2 Public Perceptions – Does a Disjuncture between Public Perceptions and the Law Matter?

The existence of a disjuncture between public perceptions and CEM law could be interpreted as an indicator of the need to flick the ‘moral scruples’ switch to ‘on’⁵⁶² to ensure that the offending readiness of the Opportunistic Offender remains ‘qualified’.⁵⁶³ For, as Cornish and Clarke explain, the Opportunistic Offender exists in a state of ‘qualified readiness’.⁵⁶⁴ This means his (or her) ‘readiness’ is:

continually sensitive to situational cues denoting the inexcusability or impermissibility of any contemplated action even when in the crime situation itself and on the point of offending.⁵⁶⁵

In other words, challenging perceptions that may excuse or permit offending strengthens an Opportunistic Offender’s internal inhibitions against offending. Underlining this point is the potential for overlap between the purported ‘disjuncture’ evident among the perceptions of some sections of the Australian community (see, 1.4) and perceptions associated with a ‘cognitive shift’ to a more accepting perception of CEM offending.⁵⁶⁶ Making this point, Winder and Gough state ‘there needs to be a shift in public thinking about such offences so that such justifications are more difficult for individuals to use before committing such offences’.⁵⁶⁷

In this context, the fact that the current policy architecture does not include a strategy to prevent onset suggests, at the very least, that the current policy settings do nothing

⁵⁶¹ Ibid 64.

⁵⁶² Ibid 80.

⁵⁶³ Ibid 67.

⁵⁶⁴ Ibid.

⁵⁶⁵ Ibid.

⁵⁶⁶ Sandy Jung, Liam Ennis and L Alvin Malesky, ‘Child Pornography Offending Seen Through Three Theoretical Lenses’ (2012) 33(8) *Deviant Behavior* 655, 658.

⁵⁶⁷ Winder and Gough, above n 549, 140.

to assist in switching the ‘moral scruples’ switch to ‘on’ and, as a consequence, the Opportunistic Offender may be vulnerable (see, 3.6). Indeed, with general relevance, researchers suggest that the current online experience of CEM offenders is such that they perceive their behaviour as on the ‘extreme lower end of the harm dimension (i.e. not harmful)’.⁵⁶⁸ In addition, and with particular relevance for young people, Prichard and colleagues suggest that a failure to appreciate the harms associated with viewing CEM means that onset is likely to be a ‘simpler matter’ for this cohort.⁵⁶⁹

3.7 CONCLUSION

This chapter argued that the current policy architecture for CEM offending at the national level evinces a policy blind spot. This blind spot was characterised as the Second Aim of primary prevention, that is, preventing the first time use of CEM (see, 3.2). It was concluded that this blind spot should be tackled based on three arguments that turned on ‘how’ offending begins, ‘why’ offending occurs and ‘who’ offenders are (see, 3.4 generally). To further support this contention, the lens of SCP was used to show how a potentially valuable opportunity to prevent offending was being overlooked; that is, preventing the Opportunistic Offender from onset. In making this argument, the final part of this chapter considered the role of public perceptions in light of the vulnerabilities of the Opportunistic Offender.

Looking ahead, this issue is revisited in Chapter 7, which examines what the empirical study of public perceptions undertaken in Chapter 6 reveals about the key gaps in public knowledge and awareness and what this could mean for the Opportunistic Offender. Attention then turns to reflect on the implications of this discussion from a public policy perspective, asking the question: *What Do Public Perceptions Reveal about Preventing the Opportunistic Offender from Onset?* Before doing so, the following chapter interrogates the jurisprudential foundation that justifies calling on the State to remedy the policy blind spot identified in this chapter.

⁵⁶⁸ Bartels and Merdian, above n 479, 21.

⁵⁶⁹ Prichard et al, above n 461, 999.

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CHAPTER 4: PREVENTING VIEWING – LESSONS FROM LEGAL THEORY

4.1 INTRODUCTION

The previous chapter adopted a crime prevention perspective to examine issues around the prevention of the online viewing of CEM. This examination highlighted the public policy blind spot with respect to prevention, and emphasised the need for the State to play a larger role in this context. Building on this analysis, this chapter interrogates the jurisprudential foundation that justifies this call, focusing on the relationship between the State and the citizen in common law jurisdictions. This chapter explores this relationship by examining two prominent legal theory principles, the principle of security and the principle of individual autonomy.

This chapter first examines the State's duty to promulgate laws to its citizens under the principle of security and the consequential duty this creates to publicise law. Although a duty to publicise law has long been recognised, the framework recently put forward by Andrew Ashworth guides this examination, as it offers a unique tool to evaluate whether this duty has been fulfilled.⁵⁷⁰

The second part of this chapter explores the relationship between the State and the citizen with respect to the principle of individual autonomy. In this chapter, this principle is operationalised as the requirement on the State to give fair warning of criminalisation, which in part, turns on a relationship between law and behaviour. Through the lens provided by these duties, this chapter evaluates the present ability of the criminal law to prevent offending and what role evidence about public perceptions may play in this context. In adopting this lens, it is acknowledged that these duties are part of a normative account of the criminal law that is 'aspirational',⁵⁷¹ rather than strictly pragmatic.⁵⁷² This means that clear answers about how to weigh such

⁵⁷⁰ Andrew Ashworth, *Positive Obligations in Criminal Law* (Bloomsbury Publishing, 2013) 102.

⁵⁷¹ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 81.

⁵⁷² Nicola Lacey, 'Principles, Policies, and Politics of Criminal Law' in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press, 2012) 33.

principles against each other, wider criminal law theory, and the existing political and social reality, is difficult. As Lacey explains:

a normative account of criminal law cannot itself counter the political and social forces which have led to the expansion of pragmatic criminalisation in recent years: nor can such an account do anything to change the underlying dynamics of the political and social system which has produced those forces.⁵⁷³

In other words, the chief difficulty with a principled view of the criminal law is how to account for the reality that the criminal law is, invariably, used by the government of the day to attempt to remedy a social problem with the aim of ‘political gain’.⁵⁷⁴ While it is beyond the scope of this chapter to engage with these broader questions, if nothing else, the arguments made in this chapter are a response to the call that ‘principled arguments continue to be pressed’⁵⁷⁵ and an acknowledgment that these principles share in a common objective of preventing crime in the first instance.

4.2 THE PRINCIPLE OF SECURITY AND THE STATE’S DUTY TO PUBLICISE THE LAW

In modern democratic nations, the principle of security is described as the ‘raison d’être’ for the State’s existence.⁵⁷⁶ It requires that the State secure for its citizens the conditions of ‘order and security that are prerequisites of freedom’.⁵⁷⁷ This means, as Duff points out, that it is part of the State’s primary duty:

to seek to reduce the incidence of the kinds of conduct that are properly criminalised, since it is a proper part of the state’s responsibility to seek to protect its citizens from suffering such wrongs.⁵⁷⁸

⁵⁷³ Ibid 29.

⁵⁷⁴ Ibid 30.

⁵⁷⁵ Ashworth and Horder, above n 571, 81; Lacey, above n 572, 33.

⁵⁷⁶ Andrew Ashworth and Lucia Zedner, ‘Punishment Paradigms and the Role of the Preventive State’ in A P Simester and Antje Du Bois-Pedain Ulfrid Neumann (eds), *Liberal Criminal Theory: Essays for Andreas Von Hirsch* (Hart Publishing, 2014) 10; Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014) 8; Cf Klaus Günther, ‘Responsibility to Protect and Preventive Justice’ in Lucia Zedner and Patrick Tomlin Andrew Ashworth (ed), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 448 (arguing that ‘the myth that the sovereign state is capable of providing security, law and order, and crime control within its territorial boundaries’).

⁵⁷⁷ Ashworth and Zedner, above n 576, 8.

⁵⁷⁸ R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*, Legal Theory Today (Hart Publishing, 2007) 87.

In other words, this duty includes the requirement to prevent crime on the basis that this will help to reduce the social harms and costs of offending to society.⁵⁷⁹

Accordingly:

the protective or preventative function [of the criminal law] is written into the very fabric of state authority and imposes upon the state a duty to promulgate laws and pursue policies in order to provide security for its citizens.⁵⁸⁰

It is well established in liberal theory that the State has this duty, even if debate continues about how to define ‘security’ and what any definition includes.⁵⁸¹ The foundation of this duty is the rule of law which, although it has no legal force per se, is a central principle of liberalism.⁵⁸² Described in general terms, the ‘rule of law’ is said to ‘stand for the supremacy of law over the supremacy of individual will’.⁵⁸³ It consists of ‘values’⁵⁸⁴ or ‘features’⁵⁸⁵ that the law should aspire to and, in democratic states at least, mediates the relationship between the State and the citizen, particularly with respect to the criminal law.⁵⁸⁶

While ambiguity remains around the precise parameters of the State’s duties to citizens under the umbrella of the rule of law, a ‘duty to provide protection from the hazards and threats that [citizens] would otherwise face’ has always been included within these parameters.⁵⁸⁷ Even accepting, as Taylor and Auerhahn argue, that in contemporary society greater emphasis is placed on the obligations of the governed, the notion that ‘contemporary citizens surrender some individual liberties with the expectation that the justice system will offer protection from crime’⁵⁸⁸ remains

⁵⁷⁹ Ashworth, above n 570, 102.

⁵⁸⁰ Ashworth and Zedner, above n 576, 10.

⁵⁸¹ See generally Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 2013) 26.

⁵⁸² A P Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (Hart Publishing 6th ed, 2016) 21.

⁵⁸³ Denise Meyerson, ‘The Rule of Law and the Separation of Powers’ (2004) 4 *Macquarie Law Journal* 1, 1.

⁵⁸⁴ Simester et al, above n 582, 21.

⁵⁸⁵ Bruno Celano, ‘Publicity and the Rule of Law’ in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law* (Oxford University Press, 2013) 122.

⁵⁸⁶ Ibid 123.

⁵⁸⁷ Ashworth and Zedner, above n 576, 9.

⁵⁸⁸ Caitlin J Taylor and Kathleen Auerhahn, ‘Community Justice and Public Safety: Assessing Criminal Justice Policy Through the Lens of the Social Contract’ (2014) 15(3) *Criminology and Criminal Justice* 300, 301–302.

prominent. The caveat to this proposition is that it does not imply that the State has or should have a ‘free hand’ in this context.⁵⁸⁹ Rather, the actions of the State are constrained by rule of law principles that require, *inter alia*, that the law be publicised;⁵⁹⁰ a duty well established in legal theory.

4.2.1 The Duty to Publicise the Law

In *Leviathan*, Thomas Hobbes argued that it is contrary to the State’s duty to allow people to be ‘ignorant, or misinformed’ of the law.⁵⁹¹ Hobbes states:

To rule by words, requires that such words be manifestly made known; for else they are no laws: for to the nature of laws belongeth a sufficient, and clear promulgation, such as may take away the excuse of ignorance; which in the laws of man is but of one only kind, and that is, proclamation, or promulgation by the voice of man.⁵⁹²

More recently, Lon Fuller propounded that one of the ‘eight distinct routes to disaster’ for a legal system is that there is a ‘failure to publicize, or at least make available to the affected party, the rules he is expected to observe’.⁵⁹³ Making a similar point, Darley, Carlsmith and Robinson assert that ‘educating the community on the lines that the [criminal law] draws between allowable and criminal conduct’ is part of the burden of being a ‘wise code drafter’.⁵⁹⁴

As foreshadowed above, Ashworth has recently proposed, as part of a broader critique of the common law doctrine of ignorance of the criminal law, a ‘practical line of reasoning’, which bridges the divide between principle and practice in this area.⁵⁹⁵ Using Ashworth’s four steps, the following part evaluates the actions of the State with

⁵⁸⁹ Andrew Ashworth, ‘Criminal Law, Human Rights and Preventative Justice’ in Bernadette McSherry, Alan Norrie and Jan Simon (eds), *Regulating Deviance: The Redirection of Criminalisation* (Bloomsbury Publishing, 2008) 97.

⁵⁹⁰ Ashworth, above n 570, 101.

⁵⁹¹ Thomas Hobbes, *Leviathan* (University of Adelaide, 1651) ch 30; Jeremy Waldron, ‘Hobbes and the Principle of Publicity’ (2001) 82 *Pacific Philosophical Quarterly* 447.

⁵⁹² Hobbes, above n 591, ch 31.

⁵⁹³ Lon L Fuller, *The Morality of Law* (Yale University Press, 1964) 39.

⁵⁹⁴ John M Darley, Kevin H Carlsmith and Paul H Robinson, ‘The Ex Ante Function of the Criminal Law’ (2001) 35(1) *Law & Society Review* 165, 186 (stating ‘[e]ven wiser code drafters should take on the burden of explaining to the community why it is that subset of law, with the legislature chose to adopt and which violate the moral intuitions of the community, are nonetheless morally appropriate or otherwise justified’).

⁵⁹⁵ Ashworth, above n 570, 102.

respect to the prohibition on accessing CEM. The value and application of Ashworth's perspective in this context turns on the two central contentions of his argument. First, that the State has a duty to publicise the law; and, second, that a failure by the State to fulfil this duty may weaken the ability of the criminal law to prevent offending.

4.2.2 The Central Pillars of Ashworth's Argument

In his recent book, *Positive Obligations in Criminal Law*, Ashworth argues that the rule of law requires, through the States' duty of security, that:

the state should take steps to ensure that fewer of the wrongs and harms it criminalises actually take place. It is better that crimes do not occur in the first place than we convict people after they have committed them: the result should be fewer victims and fewer offenders.⁵⁹⁶

One of the ways that the State can attempt to decrease the amount of crime is, Ashworth argues, 'to put greater energy into publicising the criminal law'.⁵⁹⁷ The State bears a responsibility to do so as it owes an obligation to the community to reduce the social costs of crime.⁵⁹⁸ In the criminal law context, it is the State that is in the best position to make a real difference by, for example, 'organis[ing] and co-ordinat[ing] the necessary mechanisms for informing citizens'.⁵⁹⁹ Yet, this duty has limits. An important caveat is, as Ashworth identifies, that there is a responsibility on citizens to find out what the law is.⁶⁰⁰ Ashworth conceptualises this as 'two interlocking duties' that fall respectively on the citizen — the duty to know the law — and the State — the duty to make the law known.⁶⁰¹ This duty weighs more heavily on the State than the citizen as the State is in the best position to provide citizens with information about the criminal law and about changes to it, albeit buttressed by the

⁵⁹⁶ Ibid 101.

⁵⁹⁷ Ibid.

⁵⁹⁸ Ibid 102.

⁵⁹⁹ Ibid.

⁶⁰⁰ Ibid 101.

⁶⁰¹ Ibid.

corresponding duty on the citizen to know the law.⁶⁰² This raises a broader question, namely, what does — or *should* — ‘know’ mean in this context?

4.2.3 What does it Mean for the Public to Know the Law?

To answer this question, the starting point must be that it is unrealistic to expect an ordinary citizen to have anything resembling a detailed knowledge of the criminal law. Stevenson accurately observes that ‘[a]verage citizens do not peruse statute books even once in their lifetimes; most will never read even one full paragraph from a court opinion’.⁶⁰³ Nonetheless, to function effectively, as Darley points out, the criminal justice system relies on individuals ‘knowing where the boundaries of their behaviour lie.’⁶⁰⁴ Making a similar point, Trickner and Tyler state that the maintenance of social order in society requires that the majority of the public can be relied on to regulate their own behaviour.⁶⁰⁵ Identifying the central issue, Gardner discerned:

The presumption that everyone knows the law, or at any rate knows the general criminal law, becomes untenable if we insist that people can only know the law by its texts, and we proceed to design the law accordingly. Most people have better things to do than acquaint themselves with a mass of legal materials, however easy to read and understand. Most people, most of the time, need to know roughly what the law says on non-specialist matters without knowing, or caring, how the law says it.⁶⁰⁶

The use of ‘says’ refers to the actual text of the law, that is, the textual form of the specific legislative provision. This offers a helpful constraint on how the duty on the State to publicise the law should be interpreted. The State is not required to publicise the minutia of the criminal law — indeed such an argument is absurd. Rather, the State should publicise the law to the degree that the ordinary citizen is made aware of the general parameters of criminal law prohibitions — ‘roughly what the law says’ —

⁶⁰² Ibid.

⁶⁰³ Drury Stevenson, ‘To Whom Is the Law Addressed?’ (2003) 21(1) *Yale Law & Policy Review* 105, 106.

⁶⁰⁴ Darley, Carlsmith and Robinson, above n 594, 166.

⁶⁰⁵ Rick Trinkner and Tom R Tyler, ‘Legal Socialization: Coercion Versus Consent in an Era of Mistrust’ (2016) 12 *The Annual Review of Law and Social Science* 417, 420.

⁶⁰⁶ John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, 2007) 44–45; John Gardner, ‘Rationality and the Rule of Law in Offences against the Person’ (1994) 53(3) *The Cambridge Law Journal* 502, 513.

at least where such prohibitions relate to ‘non-specialised matters’,⁶⁰⁷ that is where the prohibition has a more general application.

4.2.4 Does the Offence of Accessing have General Application?

A number of factors underline why the prohibition on accessing merits consideration as a law of general application. One, empirical studies reveal that there may be a mainstreaming of viewing behaviours within the general population.⁶⁰⁸ Two, Australian law enforcement bodies express concern that the ‘societal appetite’ for CEM is increasing in Australia.⁶⁰⁹ Three, crime statistics indicate that prosecutions for accessing CEM are a consistent feature of the Australian criminal justice system (see, 1.3.1). These factors give cause to consider more closely whether the State has fulfilled its duty to publicise the law in this area.

4.3 A PRACTICAL EVALUATION – IS THE LAW SUFFICIENTLY PUBLICISED?

As mentioned above, Ashworth’s practical line of reasoning offers four steps to evaluate whether the State has fulfilled its duty to publicise the law. These include:

- a) complete accessibility of the text of criminal laws;
- b) availability of a simplified version of the criminal law for non-specialists;
- c) appropriate efforts to publicise a simplified version; and
- d) special attention to the education of children.⁶¹⁰

Ashworth questions whether the imposition of criminal responsibility is justifiable where a crime is committed from ignorance, stating that ‘[a]llowing crimes to be committed through ignorance amounts to a failure of the state’s duty of security’.⁶¹¹

⁶⁰⁷ Gardner, above n 606, 44–45.

⁶⁰⁸ See also Crookes, Merdian and Hassett, above n 468, 171 (suggesting that ‘[a]ccessing CSEM may potentially be more normative than previously assumed’); Wortley and Smallbone, above n 50, 49 (describing how the internet has ‘pushed the problem of child pornography further into the normal population’); Westlake, Bouchard and Frank, above n 493, 24.

⁶⁰⁹ Australian Federal Police, ‘Annual Report 2015–16’ (Commonwealth of Australia, 2016) <<https://www.afp.gov.au/sites/default/files/PDF/Reports/afp-annual-report-2015-2016.pdf>> 47.

⁶¹⁰ Ashworth, above n 570, 102.

⁶¹¹ Ibid 102.

Ashworth's work offers a practical framework to explore if and where the State may have fallen short of this duty. In exploring these implications, the following part demonstrates that, where this duty is found not to be satisfied, there is a principled basis to justify calling on the State to do more to publicise the prohibition on accessing CEM as it appears under Australian law (see, 1.2.3–1.2.4).

4.3.1 'Accessibility of Complete Texts of Criminal Law'

The accessibility of criminal law text is fundamental.⁶¹² The key offence provision relevant to 'accessing' CEM appears in the federal legislation, although Tasmania and South Australia also have an accessing provision in their legislation (see, 1.2.3). These texts are accessible via a number of free online electronic databases (e.g., the *Australasian Legal Information Institute* ('Austlii') and the *Federal Register of Legislation*). Even leaving to one side the issue of whether an average person would realise what body of law is applicable, the basic text of the legislation does not provide a complete account, as other sources such as the common law, inform its meaning.⁶¹³ Thus, while technically accessible, the practical accessibility of the law is, on its face, questionable particularly where judicial interpretation affects the scope of the definition of CEM (see, 1.2.4 for example). Underlining Ashworth's point about how citizens can be expected to find out about developments in the law,⁶¹⁴ the meaning of key terms used in these legislative provisions are not static, but continue to evolve (see, 1.2.4). Moreover, in addition to time and inclination, online access to these databases assumes an individual has access to a computer, the relevant computer literacy to be able to navigate access to legislative databases and a sufficiently high level of literacy to be able to understand the content once found.⁶¹⁵

There are real questions about whether members of the public are able to understand legislation. For example, how reasonable is it to assume understanding if 49 per cent of Tasmanians (15–74 years old) do not have the literacy skills required to cope with the demands of everyday life and work?⁶¹⁶ While perhaps less relevant for offences

⁶¹² Ibid 103.

⁶¹³ Ibid 103.

⁶¹⁴ Ibid 103.

⁶¹⁵ Ibid 102.

⁶¹⁶ Tasmanian Council of Social Service, 'Tasmanian Voices: Adult Motivations for Learning Core Skills' (TasCOSS, 2011) 12.

that require the use of the internet — such as that of accessing under the federal legislation (see, 1.2.3) — a general question remains about the reasonableness of assuming sufficient computer literacy in a society where some adults struggle with simple tasks like sending emails remains.⁶¹⁷ If requiring these skills places an ‘unfair burden on citizens’,⁶¹⁸ as Ashworth argues, it must be concluded that the accessibility of the law is far from made out.

4.3.2 ‘Preparing a Simplified Version of General Criminal Laws’

The need to prepare a simplified version of general criminal laws places an obligation on the State to explain the criminal law to the individuals whom it might affect in ‘simple language’.⁶¹⁹ This stipulation directs attention to the measures taken by the State to inform citizens of the criminal prohibitions that apply to the viewing of CEM online and what the definition of CEM encompasses.

Yet, at the national level, the response of the State does not encompass such measures (see, 3.3), although the text of the criminal law is available through the online legislative databases (see, 4.3.1). While some attempt to publicise the general criminal law is evident in those states that have a state-based accessing provision, if CEM is even mentioned, little or no reference is made of the offence of accessing itself.⁶²⁰ Moreover, the language used in legislation is complex, meaning that even if a citizen found the relevant provision, it may not improve their understanding. To take one example, under the Tasmanian legislation s130D states that:

A person who, with intent to access child exploitation material, accesses child exploitation material is guilty of a crime.⁶²¹

The definition of ‘access’, which is in a separate part of the legislation, provides that:

⁶¹⁷ Ibid 26.

⁶¹⁸ Ashworth, above n 570, 102.

⁶¹⁹ Ibid 103-104.

⁶²⁰ Legal Services Commission of South Australia, *Law Handbook: Pornography*, Government of South Australia <<https://www.lawhandbook.sa.gov.au/ch12s07s02s01.php#Ch2078Se299188>>; Hobart Community Legal Service Inc., *Tasmanian Legal Handbook* Government of Tasmania <<https://www.hobartlegal.org.au/handbook/crime-and-punishment/>>.

⁶²¹ *Criminal Code 1924* (Tas) s 130D.

access, in relation to material, includes the display of the material by an electronic medium or any other output of the material by an electronic medium.⁶²²

There are valid reasons why provisions take this form in a legal context. That said, a question that arises is whether an ordinary citizen would realise — assuming of course that they are able to locate the definition of ‘access’ — that this term encompasses simple viewing and to that end, other actions such as reading material. In ordinary parlance the word ‘access’ is not commonly equated to just looking at material.⁶²³ Making this point, Ashworth states ‘one may be aware that downloading child pornography is treated as a serious offence without knowing that the definition of ‘downloading’ includes simple viewing’.⁶²⁴

Thus, even if a general prohibition is comprehended, it does not necessarily follow that the pertinent details of the prohibition, which at a minimum must include the scope of behaviour and range of material captured, are also understood. This is further discussed in Chapter 7.

4.3.3 ‘Preparing and Implementing a Communication Strategy’

This step directs focus to the efforts made by the State to publicise the law. Ashworth observes that ‘[c]itizens need information about new criminal offences and about the ambit of the existing criminal law; and information is needed for adults and for children’.⁶²⁵ This requires the State to have a ‘communication strategy’ to publicise changes in the law to the population, and, for more specific or discrete changes, direct information towards individuals for whom that information may be particularly relevant.⁶²⁶ In part, the basis for this is that, as Ashworth observes, ‘publicity about a new law can enhance law-abidance’.⁶²⁷ While further observing that the efficacy of campaigns to raise public awareness about offences requires further investigation,

⁶²² *Criminal Code 1924* (Tas) s 1A.

⁶²³ Jeremy Horder, ‘Rethinking Non-Fatal Offences against the Person’ (1994) 14 *Oxford Journal of Legal Studies* 335, 335 (stating more particularised crime definitions are preferable in affording fair notice or fair labelling).

⁶²⁴ Ashworth, above n 570, 104.

⁶²⁵ *Ibid* 104.

⁶²⁶ *Ibid*.

⁶²⁷ *Ibid* 105.

Ashworth argues that they should, nonetheless, be considered as ‘a primary method by which the State carries through its duty of security’.⁶²⁸

Of note here, the national policy architecture in Australia does not include a communication strategy to educate the public about the parameters of CEM law, either generally, or for individuals for whom the information may be particularly relevant such as individuals who might be exposed to opportunities to offend. For example, information about the parameters of CEM law could be particularly relevant to users of adult pornography websites and users of P2P networks, given evidence indicates these sites and networks may harbour opportunities for onset (see, 3.4.1). Adding to this, given that the definition of CEM in Australia is considerably wider than other jurisdictions, there is a possibility that an Australian could unwittingly access material that is criminal in Australia but legal in the jurisdictions where the material is hosted.⁶²⁹

4.3.4 ‘The Special Problem of Children’

Consideration of this step has important implications for the viewing of CEM. Not merely because of the potential for children to be victimised by adults in the production of material, and further affected by the act of viewing material (see, 2.5), but because children may fall foul of the prohibition on viewing CEM itself.

A recent Queensland Sentencing Advisory Council report revealed that over the last 10 years approximately 48 per cent of offenders dealt with for CEM offences in Queensland were between 10 and 16 years old.⁶³⁰ As this report shows, the issue of self-generated material, often termed ‘sexting’, warrants considerable attention.⁶³¹ But

⁶²⁸ Ibid.

⁶²⁹ Note: the decision in *Ashcroft v Free Speech Coalition* 535 U.S. 234 (2002) means that some forms of computer-generated material are excluded from the exception to the First Amendment exception that applies to other former of material.

⁶³⁰ Queensland Sentencing Advisory Council, ‘Sentencing Spotlight on...Child Exploitation Material Offences’ (Queensland Sentencing Advisory Council, 2017) <http://www.sentencingcouncil.qld.gov.au/_data/assets/pdf_file/0010/519535/sentencing-spotlight-on-child-exploitation-offences.pdf>.

⁶³¹ See generally Crofts and Lee, above n 282, 85–106; Crofts et al, above n 282.

it is not, nor should it be, the only area of concern, as research suggests that adolescent offenders may account for a growing proportion of CEM offending.⁶³²

While not underestimating the challenge of communicating the criminal law to young people,⁶³³ Ashworth argues that it is critical to educate this group about areas of the law that are, or may be, relevant to them through, for example, sustained education programs in schools.⁶³⁴ This is an important point because, as previously discussed, although significant resources are directed at reducing the likelihood that children will be victimised, little, if any, direct attention is given to preventing individuals from becoming offenders (see, 3.3). Commenting on the Australian context, Albury and Crawford make the point that, with respect to the broader issue of sexting, initiatives aimed at tackling ‘perpetrators’ were ‘strangely absent’.⁶³⁵

In summary, the examination of these four steps leads to the tentative conclusion that the State may have fallen short of its duty to publicise the prohibition on accessing CEM as it appears under Australian law; as a consequence, it is possible that a crime may be committed from ignorance.⁶³⁶ This discussion is returned to later in this thesis, after the reporting of the results of the empirical study of public perceptions undertaken in Chapter 6.

4.4 THE PRINCIPLE OF INDIVIDUAL AUTONOMY AND THE STATE’S DUTY TO GIVE FAIR WARNING

This part explores the intersection between public perceptions of the online viewing of CEM and the principle of individual autonomy — a principle described as ‘[o]ne of the fundamental concepts in the justification of criminal laws’.⁶³⁷ This principle provides that ‘each individual should be treated as responsible for his or her own

⁶³² Marcel Aebi et al, ‘Criminal History and Future Offending of Juveniles Convicted of the Possession of Child Pornography’ (2014) 26(4) *Sexual Abuse* 375, 376 (adolescent offenders account for between three and 15% of offending). For an Australian perspective see Albury and Crawford, above n 542, 469; Albury et al, above n 542, 12.

⁶³³ Ashworth, above n 570, 105.

⁶³⁴ Ibid 106.

⁶³⁵ Albury and Crawford, above n 542, 465.

⁶³⁶ Ashworth, above n 570, 102.

⁶³⁷ Ashworth and Horder, above n 571, 23.

behaviour'.⁶³⁸ Predicated on notions of 'free will', the factual dimension of this principle holds that 'individuals in general have the capacity and sufficient free will to make meaningful choices'.⁶³⁹ This principle underlies the principle of *mens rea*, and the requirement on the State to give fair warning of criminalisation to its citizens. As Ashworth explains, this requires:

that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences.⁶⁴⁰

Against this background, it is argued that the policy blind spot identified in the previous chapter (see, 3.3), coupled with evidence of a 'disjuncture' between public perceptions and the criminalisation of viewing CEM in Australia (see, 1.4 generally), gives cause to consider whether the principle of fair warning (also called fair notice) is satisfied. In other words, this part explores whether a person who accesses CEM in Australia can 'fairly be said to have chosen the behaviour and its consequences'.⁶⁴¹

4.4.1 The Role of the State and the Duty to give Fair Warning

Admittedly, much of this argument turns on how this principle is conceptualised.⁶⁴² In line with the argument that the law should be sufficiently publicised, Ashworth and Horder present a conceptualisation that, rejecting an individualistic approach, focuses on the role of the State. They state that this principle 'requires fair warning of the criminal law's provisions and no undue difficulty in ascertaining them'.⁶⁴³

Under this conceptualisation, the ability of a citizen to 'know of the existence and extent of a rule is fundamental'.⁶⁴⁴ The criminal law is thus a means through which to

⁶³⁸ Ibid 23.

⁶³⁹ Ibid.

⁶⁴⁰ Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 6th ed, 2009) 155.

⁶⁴¹ Ibid.

⁶⁴² Peter Westen, 'Two Rules of Legality in Criminal Law' (2006) 26 *Law and Philosophy* 229, 229; James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *The Modern Law Review* 217.

⁶⁴³ Ashworth and Horder, above n 517, 64.

⁶⁴⁴ Ibid 64.

‘offer advance guidance’⁶⁴⁵ to citizens. Expanding on this point, Simester and Sullivan state that the ‘criminal law is not there solely to tell police and judges what to do after someone offends’ — tertiary prevention — ‘but also to tell *citizens* what not to do in advance’ — primary prevention, or more accurately, the Second Aim of primary prevention (see, 3.2).⁶⁴⁶ Providing a recent example of the application of this argument for sexual offending, Larcombe posits:

if we think about the criminal law as playing *only* a tertiary intervention role in relation to sexual violence, we overlook law’s regulatory and communitive functions — in particular, its role in developing and promulgating norms that guide social conduct.⁶⁴⁷

Another way to perceive the idea that the criminal law offers guidance or communicates with citizens, is that it has an ‘expressive’ function — that is that the law, particularly the criminal law, plays a normative role in society.⁶⁴⁸

As McAdam explains, this perspective:

resists the simple claim that law directs behaviour only because the state inflicts a cost on violators [instead proposing that the] law also expresses normative principles and symbolizes societal values, and these moralizing features may affect behaviour.⁶⁴⁹

⁶⁴⁵ Winnie Chan and A P Simester, ‘Four Functions of Mens Rea’ (2011) 70(02) *The Cambridge Law Journal* 381, 388.

⁶⁴⁶ Simester and Von Hirsch, above n 4, 27.

⁶⁴⁷ Wendy Larcombe, ‘Limits of the Criminal Law for Preventing Sexual Violence’ in Nicola Henry and Anastasia Powell (eds), *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture* (Palgrave MacMillan, 2014) 64.

⁶⁴⁸ Cass R Sunstein, ‘Social Norms and Social Roles’ (1996) 96(4) *Columbia Law Review* 903, 953; Emanuela Carbonara, Francesco Parisi and Georg von Wangenheim, ‘Legal Innovation and the Compliance Paradox’ (2008) 9(2) *Minnesota Journal of Law, Science & Technology* 837; Nigel Walker and Michael Argyle, ‘Does the Law Affect Moral Judgement?’ (1964) 4(6) *The British Journal of Criminology* 570, 570; Simester and Von Hirsch, above n 4, 5.

⁶⁴⁹ Richard H McAdams, ‘The Origin, Development, and Regulation of Norms’ (1997) 96 *Michigan Law Review* 338, 398. See also Stefan Svallfors, ‘Policy Feedback, Generational Replacement, and Attitudes to State Intervention: Eastern and Western Germany, 1990–2006’ (2010) 2(1) *European Political Science Review* 119, 120 (describing the ‘normative feedback effect’ of policy, which signal to citizens ‘the desirable state of affairs’).

This perspective of law has wide appeal for, as Tonry and Farrington point out, the assumption that law affects behaviour is a common premise of policy change.⁶⁵⁰

4.4.2 Does Law Affect Behaviour?

The question of whether law does in fact affect behaviour, not to mention how it does, lacks a clear answer, although explanations abound.⁶⁵¹ For example, it has been observed that '[s]ome people who might engage in activities if they were legal refrain from them because they are illegal'.⁶⁵² Others speculate that 'people's compliance [with law] may stem at least as much — if not more — from personal commitment to law-abiding behaviour'.⁶⁵³ Taking a similar position, Tonry and Farrington propose that 'the existence and enactment of laws serve part of the normative context within which individual's personal values and beliefs take shape'.⁶⁵⁴ The commonality between these arguments is that they propose that laws can, or may, affect attitudes. In other words, the way someone evaluates a particular behaviour may be influenced by his or her perception (their knowledge) of its legality or otherwise.⁶⁵⁵

Similarly, and emphasising the singular influence of the criminal law, Robinson and Darley contend that the 'criminal law in particular can influence the norms that are held by the social group and that are internalized by the individual'.⁶⁵⁶ That is, in part, an individual's internalised perception of a particular behaviour may derive from

⁶⁵⁰ Michael Tonry and David P Farrington, 'Strategic Approaches to Crime Prevention' (1995) 19 *Crime and Justice* 1, 4.

⁶⁵¹ Phillip B Levine and Douglas Staiger, 'Abortion Policy and Fertility Outcomes: The Eastern European Experience' (2004) 47(1) *Journal of Law and Economics* 223 (examining whether outlawing abortion affected birth rate, among other things); Naci Mocan and Erdal Tekin, 'Guns and Juvenile Crime' (2006) 49(2) *The Journal of Law & Economics* 507 (examining issues relating to gun availability and juveniles in the United States).

⁶⁵² Tonry and Farrington, above n 650, 5.

⁶⁵³ Jonathan Jackson et al, 'Why do People Comply with the Law?: Legitimacy and the Influence of Legal Institutions' (2012) 52(6) *British Journal of Criminology* 1051, 1052.

⁶⁵⁴ Tonry and Farrington, above n 650, 5.

⁶⁵⁵ Niklas Jakobsson and Andreas Kotsadam, 'Do Laws Affect Attitudes? An Assessment of the Norwegian Prostitution Law Using Longitudinal Data' (University of Gothenburg School of Business, Economics and Law, 2010) 19.

⁶⁵⁶ Paul H Robinson and John M Darley, 'The Utility of Desert' (1997) 91(2) *Northwestern University Law Review* 453, 471 (this influence 'comes from [the criminal law] being a societal mechanism by which the force or social norms is realized and by which the force of internal moral principles is strengthened. That is, the law has no independent force, the way social group norms and internalized norms do. It has power to the extent that it can amplify and sustain these two power sources; it has power to the extent that it influences what the social group thinks and what its members internalize').

values signalled by laws. Also pointing to the singular effect of the criminal law, Simester and von Hirsch assert that, in contrast with civil law, the criminal law is:

a regulatory tool for influencing behaviour, and in some respects no more than that; but it is a special kind of tool. The essential distinction between criminal and civil law lies in the social significance of the former — in the way criminal laws, convictions, and sanctions are understood. The criminal law has a communicative function which the civil law does not. It speaks with a distinctly moral voice, one that the civil law lacks.⁶⁵⁷

Moreover, Robinson argues that in certain circumstances the criminal law can ‘harness’ normative forces and, among other things, ‘earn ... a role in shaping societal norms’.⁶⁵⁸ The word ‘earn’ reflects a pragmatic view whereby law is conceptualised as a ‘vehicle by which the community debates, tests, and ultimately settles upon and expresses its norms’.⁶⁵⁹

Put another way, the act of criminalisation may ‘nurture’ a particular norm⁶⁶⁰ but the law itself is not ‘an independent player in that process’.⁶⁶¹ This view sees the criminal law as ‘a contributing mechanism by which the norm-nurturing process moves forward’.⁶⁶² Law is not a compelling influence on community perceptions because as Robinson and Darley point out, ‘[p]assing a law cannot itself create a norm’.⁶⁶³ Community debate and discussion may yet play a critical role by educating and strengthening the ‘shared public understanding’ around what criminal behaviour is.⁶⁶⁴ It need hardly be pointed out that the linchpin of any such debate and discussion is, at a minimum, knowledge (or awareness) of the existence of the prohibition. This account accommodates the fact that within a given society there will be divergences

⁶⁵⁷ Simester and Von Hirsch, above n 4, 4.

⁶⁵⁸ Paul H Robinson, ‘Changing People’s Judgments of Justice’ in Paul H Robinson (ed), *Intuition of Justice and the Utility of Desert* (Oxford University Press, 2013) 153; Robinson and Darley, above n 656, 453–499.

⁶⁵⁹ Paul H Robinson, ‘Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive versus Normative Crime Control’ (2000) 86(8) *Virginia Journal of Social Policy and the Law* 1839, 1869; Robinson and Darley, above n 656, 473.

⁶⁶⁰ Robinson and Darley, above n 656, 473.

⁶⁶¹ Ibid.

⁶⁶² Robinson, above n 659, 1869; Robinson and Darley, above n 656, 473.

⁶⁶³ Robinson and Darley, above n 656, 473.

⁶⁶⁴ Ibid 472, 476.

in opinion about all manner of criminal behaviour, while also emphasising the role that knowledge of laws may, and ideally should, play in society.

Yet, beyond the general desirability of norms aligning with the criminal law, public perceptions may have a more specific relevance to prevention. Robinson states that the criminal law (and thus policy makers) should care about ‘what the lay person thinks’ because it is ‘only by heeding those views that the criminal law can provide effective crime control’.⁶⁶⁵ In other words, attention to social norms is important and the ‘moral clarity’ of such norms matters⁶⁶⁶ — a point returned to below — because ‘[w]hen a criminal law offends the moral intuitions of the governed community, the power of the entire criminal code to gain compliance from the community is risked’.⁶⁶⁷ This is clearly the extreme. It is not suggested that this argument holds weight with respect to the criminalisation of the accessing of CEM generally. There is, after all, no evidence that the imposition of this prohibition overtly offended the ‘moral intuitions’ of the community.⁶⁶⁸ However, in another guise, there is perhaps greater merit to this argument. Robinson and Darley make the point that ‘[d]iscrepancies between the [criminal] code and the community have the potential to undercut the law’s moral credibility and thereby its effectiveness’.⁶⁶⁹

Recent work by Trinkner and Tyler provides further insight in this area.⁶⁷⁰ The central contention of this work is that the ‘values and attitudes that bond the population to the

⁶⁶⁵ Robinson, above n 659, 1869; Tom R Tyler, *Why People Obey the Law* (Yale University Press 1990) 3–4 (stating ‘[i]f people view compliance with the law as appropriate because of their attitudes about how they should behave, they will voluntarily assume the obligation to follow legal rules. They will feel personally committed to obeying the law, irrespective of whether they risk punishment for breaking the law. This normative commitment can involve personal morality or legitimacy. Normative commitment through personal morality means obeying a law because one feels the law is just; normative commitment through legitimacy means obeying a law because one feels that the authority enforcing the law has the right to dictate behaviour’).

⁶⁶⁶ William Wilson, *Central Issues in Criminal Theory* (Hart Publishing, 2002) 13 (further stating ‘[b]y one set of norms (offence definitions) citizens are offered guidance as to their primary obligations’).

⁶⁶⁷ Paul H Robinson and John M Darley, ‘Intuitions of Justice: Implications for Criminal Law and Justice Policy’ (2007) 81(1) *Southern California Law Review* 1, 163.

⁶⁶⁸ *Ibid* 163.

⁶⁶⁹ Robinson and Darley, above n 656, 485; Paul H Robinson and John M Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* (Westview Press, 1995) 202–203 (in other words, the idea that if an individual does not believe in the morality of a particular law the likelihood that they will obey that law decreases).

⁶⁷⁰ Trinkner and Tyler, above n 605. See also Emanuela Carbonara, Francesco Parisi and Georg Von Wangenheim, ‘Lawmakers as Norm Entrepreneurs’ (2008) 4(3) *Review of Law and Economics* 779,

legal system' offer a 'more effective and less costly' route to garner compliance, than a focus on deterrence based tertiary prevention responses (e.g., surveillance, apprehension and punishment).⁶⁷¹ Using the term 'legal socialisation',⁶⁷² Trinkner and Tyler argue that 'values and legal attitudes' predict people's behaviour better than 'sanction related judgments' as they 'encourage people to self-regulate'.⁶⁷³ An advantage of this is the potential for decreases in the costs of deterrent-based strategies.⁶⁷⁴ Undergirding this argument, the perception of fairness is perceived as fundamental to garner public compliance as the objective is:

not about fostering blind obedience within the population, but rather stimulating a critical compliance whereby people are motivated to voluntarily follow the law to the extent that it embodies the norms upon which it is based.⁶⁷⁵

4.4.3 Has the State Fulfilled its Duty to give Fair Warning of Criminalisation?

Within broader criminal law theory, the duty on the State to give fair warning of criminalisation to citizens provides a useful yardstick by which to assess the principle of individual autonomy. The duty of fair warning is concerned with the promotion of 'predictable liability', liability that is (or can be) anticipated and is not surprising.⁶⁷⁶ As Chan and Simester explain:

780 (arguing that if a law 'departs too visibly from prior values is not likely to enjoy an immediate acceptance and internalization' and this may 'weaken the effects of legal intervention'); Tom R Tyler and Yuen Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Court* (Russell Sage Foundation, 2002); Francesco Parisi and Georg von Wangenheim, 'Legislation and Countervailing Effects from Social Norms' in C Schubert and G von Wangenheim (eds), *Evolution and Design of Institutions* (Routledge, 2006) 25–55; Emanuela Carbonara, Francesco Parisi and Georg von Wangenheim, 'Unjust Laws and Illegal Norms' (2009) *Legal Studies Research Paper Series* 1–31.

⁶⁷¹ Trinkner and Tyler, above n 605, 420.

⁶⁷² Tom R Tyler, 'Legitimacy and Criminal Justice: The Benefits of Self-Regulation' (2009) 7 *Ohio State Journal of Criminal Law* 307, 359 ('the process whereby people develop their relationship with the law').

⁶⁷³ Trinkner and Tyler, above n 605, 420.

⁶⁷⁴ *Ibid.*

⁶⁷⁵ *Ibid.*

⁶⁷⁶ Chan and Simester, above n 645, 390.

the goal of fair warning is not to ensure textual certainty *for its own sake*. What really counts is whether D can anticipate *liability in the case at hand* — whether criminal liability comes as a surprise, as something contrary to *ex ante* expectations.⁶⁷⁷

As noted above, a number of tentative indicators suggest that the law, with respect to the offence of accessing CEM, may not be ‘sufficiently publicised’.⁶⁷⁸

On its face, this could be said to call into question whether the State has given citizens fair warning of criminalisation, but it is not definitive with respect to this duty. This is because, as the quote by Chan and Simester emphasises, it is not enough to ask merely whether a citizen knows of the existence of a law, but whether an individual can, in the relevant circumstances, anticipate that they may contravene the prohibition. To evaluate this duty, a critical further question to ask is whether a citizen’s ability to predict liability for the accessing of CEM comes from any State source beyond the publicity of the law itself which, is limited (see, 4.3) and not part of the overarching policy architecture (see, 3.3).

In the context of writing about public awareness of the law, Gardner draws a useful distinction between two mechanisms that give knowledge or understanding of the law. The first is ‘textual clarity’, which refers to the need for the law to be stated clearly and concisely to increase consistent interpretation, while the second is ‘moral clarity’, which is concerned with the ‘extra-legal moral norms’.⁶⁷⁹ Demanded by the rule of law, the former is most relevant and useful to judges, prosecutors, police and other legal actors, to guide the application of law; albeit it may also help ‘a potential offender not to fall foul of it’.⁶⁸⁰ However, it is the latter that is ‘more useful to ordinary citizens’ to help them to understand the law.⁶⁸¹ If ‘moral clarity’ exists — that is, if the law resonates with the normative understandings that exist within society — the actual text of the law is less significant.⁶⁸² This view aligns with the idea that the public only need to know — and in all likelihood will only ever know —

⁶⁷⁷ Ibid 389.

⁶⁷⁸ Ashworth, above n 570, 102.

⁶⁷⁹ Gardner, above n 606, 44–45 (explaining that ‘moral clarity’ is achieved by the ‘adequate replication in the law of clear distinctions and significances, which apply outside the law’).

⁶⁸⁰ Ibid 44.

⁶⁸¹ Ibid 45.

⁶⁸² Ibid (although whether it is ‘an irrelevance’ is less clear).

‘roughly’ what the law says (see, 4.2.3).⁶⁸³ To that end, on this reasoning, it would not matter if most people did not know that it was a crime to ‘access’ CEM, provided that most people thought it was wrong to go online and intentionally look at the scope of material definable as CEM in Australia. But is this the case?

Before answering this question, the case of *Christian and others v The Queen* [2007] 2 AC 400 is briefly set out as it provides a helpful practical guide to how the concept of moral clarity can apply beyond legal theory. In brief, this case concerned the prosecution of six men for sexual offences including rape, sexual assault and incest against young girls and women under the United Kingdom *Sexual Offences Act 1956* (*Sexual Offences Act*). The offences took place on the remote island of Pitcairn, in the southern Pacific Ocean.⁶⁸⁴

The men were found guilty in the first instance and they appealed on the basis that they had ‘no realisation that they were under threat of prosecution’ because the relevant legislation had not been published, let alone publicised, on the island.⁶⁸⁵ In other words, the appellants were arguing there was a lack of textual clarity — to the extent that they did not even know of the existence of the *Sexual Offences Act* itself.

The Privy Council unanimously dismissed the appeal and affirmed the convictions in *Christian and others v The Queen* [2007] 1 LCR 726 and Lord Woolf and Lord Hoffmann made particular note of the question of knowledge. Lord Woolf characterised the issue as a question of whether ‘the appellants [were] sufficiently aware of the nature of the offence of rape and indecent assault charged respectively ... to justify prosecuting them on the charges on which they were convicted?’⁶⁸⁶ Identifying the relevant legal principle, Lord Woolf observed:

it is a requirement of almost every modern system of criminal law, that persons who are intended to be bound by criminal statute must first be given either actual or at least constructive notice of what the law requires.⁶⁸⁷

⁶⁸³ Ibid 44–45; Gardner, above n 606, 513.

⁶⁸⁴ *Christian and others v The Queen* [2007] 2 AC 400 [404].

⁶⁸⁵ Ibid [403].

⁶⁸⁶ *Christian and others v The Queen* [2007] 1 LCR 726 [35].

⁶⁸⁷ Ibid [40].

The validity of such a requirement was not at issue.⁶⁸⁸ The court accepted that the appellants were unaware of the terms of the relevant legislation,⁶⁸⁹ but the case turned on whether they were aware that their behaviour was wrong — a moral question.

Directing attention to the key issue, Lord Hoffmann stated that it was ‘impossible to believe that the appellants were not aware that what they were doing was wrong’.⁶⁹⁰ According to his lordship, this was ‘impossible to believe’ because the relevant offences — particularly rape — had been crimes for a long time on the island of Pitcairn.⁶⁹¹ Consequently, the appellants could not be said to have had ‘any doubt’ that their behaviour would be treated as criminal.⁶⁹² Put another way, despite the complete lack of textual clarity, their lordships determined that there was sufficient moral clarity to have given the offenders sufficient fair warning, such that liability could be predicted and was not surprising.⁶⁹³

As foreshadowed above, this case provides an example of how the concept of moral clarity could apply in practice. It suggests that an appropriate measure of whether the degree of moral clarity is sufficient to meet the requirement of notice or fair warning is whether it is ‘impossible to believe’ that someone would be unaware that the relevant behaviour was ‘wrong’ in the sense used above.⁶⁹⁴ Admittedly, this is a somewhat vague measure given that even within the definable limits of a particular prohibition, public perceptions may vary considerably.⁶⁹⁵

⁶⁸⁸ Ibid [44] (Lord Woolf) (stating that ‘the great majority of criminal offences require mens rea. If you do not know and are not put on notice that the conduct with which you are charged was criminal at the time you are alleged to have committed the offence, it can be the case that you do not have the necessary criminal intent. Whether or not this is the situation will very much depend on the facts and in this developing area of criminal law it is undesirable to generalise’).

⁶⁸⁹ Ibid [41].

⁶⁹⁰ Ibid [55].

⁶⁹¹ Ibid [85].

⁶⁹² Ibid [84].

⁶⁹³ Chan and Simester, above n 645, 389.

⁶⁹⁴ *Christian and others v The Queen* [2007] 1 LCR 726 [55].

⁶⁹⁵ John Monahan, ‘The Case for Prediction in the Modified Desert Model of Criminal Sentencing’ (1982) 5 *International Journal of Law and Psychiatry* 103, 105 (stating ‘[t]here is...reason to doubt that anything like a consensus exists on the seriousness of criminal conduct. While there may be some agreement on relative levels of harm, there appears to be great variation in perceptions of the absolute magnitude of harm represented by various criminal acts, and in either the relative or absolute level of culpability represented by various criminal actors’).

Despite this, a number of factors serve to call into question whether such a measure would be satisfied for the offence of accessing CEM in Australia. As with respect to the duty to publicise the law, the foremost factor is that there is a policy blind spot (see, 3.3). Other factors include that the offence of accessing is a comparatively recent addition to the criminal law (see, 1.2.2), and that the scope of this offence is very wide in terms of both the behaviour (see, 1.2.3) and the material (see, 1.2.4). A further factor is the existing research about the perceptions of Australians (see, 1.4). At the very least, these factors weigh against the notion that it would be ‘impossible to believe’ that someone would be unaware that the relevant behaviour was ‘wrong’.⁶⁹⁶ As noted earlier, further discussion on this topic is withheld until Chapter 7.

4.4.4 The Implications of a Disjuncture for Fair Labelling

It would be remiss to conclude this chapter without reference to the principle of fair labelling which, as Ashworth observes, requires that:

widely felt distinctions between kinds of offenses and degrees of wrongdoing are respected and signalled by the law and that offences are subdivided and labelled so as to represent the nature and magnitude of the law-breaking.⁶⁹⁷

In this context, the relevance of this principle turns on the potential that research into public perceptions may identify a substantial gap between, say, the perceived degree of wrongdoing involved in the act of accessing virtual-CEM and the act of accessing CEM involving a real child. Ashworth identifies a further division stating that ‘where people generally regard two types of conduct as different, the law should try to reflect that difference’.⁶⁹⁸

In other words, a substantial gap in public perceptions would call into question not only whether the State had given fair warning to citizens, but also whether the definition of CEM in Australian law is at odds with the principle of fair labelling. If a substantial gap were evident, this would provide grounds to argue that giving the

⁶⁹⁶ *Christian and others v The Queen* [2007] 1 LCR 726 [55].

⁶⁹⁷ Ashworth and Horder, above n 571, 78.

⁶⁹⁸ *Ibid* 79.

same label to both the accessing of CEM depicting a real child, and the accessing of virtual-CEM only, was incompatible with this principle.⁶⁹⁹

It hardly needs to be added that an individual may experience very negative consequences as a result of being labelled a CEM offender. Examples are not difficult to find. For instance, in 2011, a Tasmanian man was charged with a summary offence for being in possession of *The Pearl*, a work of fiction from the 19th century that included ‘references to the ages of children as young as 12 and their virginity’ and remarks about children ‘engaging in sexual activity with adults and other children’.⁷⁰⁰ Although the original conviction was quashed on appeal, and a conviction was ultimately not recorded, the charge and the subsequent court proceedings, compounded by media reporting, resulted in the defendant losing his livelihood and his reputation.⁷⁰¹

4.5 CONCLUSION

This chapter examined the relationship between the State and the citizen with respect to two fundamental duties that rest with the State: the duty to publicise the law, and the duty to give fair warning to citizens of criminalisation. This examination provides a principled basis upon which to critique the existence of the blind spot identified previously (see, 3.3). At the very least, evidence of a purported ‘disjuncture’ between public perceptions and the law in this area, as referred to by Australian researchers, suggests a level of uncertainty about whether citizens have knowledge of the law, and calls into question the degree of moral clarity around the law (see, 1.4 generally).

Conceptualised through the lens offered by this chapter, such evidence could signal that the State is not fulfilling the duties examined in this chapter, with potentially adverse implications for the present ability of the criminal law to prevent offending. As foreshadowed above, the nature and extent of this argument is explored further

⁶⁹⁹ Victor Tadros, ‘Fair Labelling and Social Solidarity’ in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press, 2012) 68 (describing such a scenario as manifesting a type of unfairness whereby, ‘the defendant has demonstrably breached the criminal law and the state has standing to call the defendant to account [b]ut the law describes the defendant’s conduct unfairly’).

⁷⁰⁰ *Traynor v McCullough* [2011] TASSC 41 [41].

⁷⁰¹ *Ibid.*

later in this thesis, in light of the results of the empirical study into public perceptions reported in Chapter 6.

However, before turning to these results, Chapter 5 examines a sample of sentencing remarks made about the viewing of CEM. In doing so, this study investigates whether, in addition to indicating the criminality of viewing CEM *per se*, sentencing remarks contain normative messages that have an educative value for the community. For this chapter, the relevance of this investigation lies in the potential that sentencing remarks offer a source of ongoing communication between the State and the citizen about the criminality of viewing CEM, and are thus a means through which to publicise the law, and give fair warning of criminalisation.

CHAPTER 5: THE EDUCATIVE VALUE OF JUDGES' SENTENCING REMARKS

Parts of the research contained within this chapter have been published as: Charlotte Hunn, Helen Cockburn, Caroline Spiranovic and Jeremy Prichard, 'Exploring the Educative Role of Judges' Sentencing Remarks: An Analysis of Remarks on Child Exploitation Material' (2018) *Psychiatry, Psychology and Law* (forthcoming). Permission to reproduce has been granted by the publisher (see, *Appendix 4*).

5.1 INTRODUCTION

Presenting novel empirical research, this chapter explores whether the remarks made by judges in sentencing offenders are a means through which the State communicates the criminalisation of viewing of CEM to the Australian community. As discussed previously, the act of criminalisation involves a declaration by the State that a type of behaviour is 'morally wrongful' and that citizens should refrain from such behaviour or face the possibility of conviction and punishment (see, 1.2.1).⁷⁰² Informed by this conceptualisation, this chapter investigates whether, beyond indicating the criminality of behaviour in terms of the latter possibility, judges' sentencing remarks contain normative messages about why the viewing of CEM is 'morally wrongful' in the context of criminalisation.⁷⁰³ In doing so, this chapter seeks to consider if remarks contain such messages and what the educative value of such messages might be for members of the Australian community. This investigation takes place in the shadow of nascent Australian research that suggests there is a disjuncture between public perceptions and legal explanations for why the viewing of CEM is criminalised (see, 1.4.2). For the sake of clarity, in this chapter, this 'disjuncture' is characterised as ambiguity around why the viewing of CEM is, itself, morally wrongful.

To undertake this investigation a sample of 57 sentencing remarks addressing offending involving the possession and accessing of CEM, were analysed. For the purpose of this study, the term 'viewing' is used to refer to both types of offence, as it is upon this act that theoretical explanations primarily turn (see, 2.1).⁷⁰⁴ This chapter begins by reviewing the nature and role of sentencing remarks in practice and theory.

⁷⁰² Simester and Von Hirsch, above n 4, 6.

⁷⁰³ Ibid 6.

⁷⁰⁴ Gillespie, above n 50, 39 (noting the behaviours are 'largely analogous').

This chapter then outlines the key components of this study, including research design, methodology and procedure and coding. In reporting the substantive findings of this study, results are described with reference to the Effect Categories identified in Chapter 2. This approach enables discussion of the potential educative value of such remarks, with reference to the literature review undertaken in Chapter 2. This chapter concludes by identifying the limits of this study, and directions for future research.

5.2 SENTENCING REMARKS: AN OPPORTUNITY FOR COMMUNICATION?

This study examines what judges say in sentencing offenders. In Australia, judges traditionally provide ‘remarks’ orally, and increasingly in written form, at the point of sentencing. These remarks will usually include comment on the justification for the particular sentence, mitigating or aggravating factors that affect the sentence, and how the sentence reflects the purposes of sentencing in the relevant jurisdiction.⁷⁰⁵ While remarks are primarily directed at the offender, they provide an opportunity to communicate with the victim and the wider community about sentencing purposes.⁷⁰⁶

Among such purposes, judges have the opportunity to ‘denounce the type of conduct in which the offender engaged’ under the sentencing purpose of denunciation.⁷⁰⁷ In doing so, as Mackenzie explains, the court ‘conveys a message from the community to the offender that the conduct is unacceptable’.⁷⁰⁸ While the function of denunciation is regarded as ‘largely symbolic’, it is nonetheless described as ‘one of the most important sentencing purposes’.⁷⁰⁹ Freiberg comments that, in part, the importance of denunciation turns on ‘the impact the judicial pronouncement itself has in reaffirming shared values’.⁷¹⁰

⁷⁰⁵ See, eg, *Sentencing Act 1991* (Vic) s 5; *Sentencing Act 1997* (Tas) s 3.

⁷⁰⁶ Geraldine Mackenzie, *How Judges Sentence* (Federation Press, 2005), 27 (describing the process of sentencing as a ‘communication tool’).

⁷⁰⁷ See, eg, *Sentencing Act 1991* (Vic) s 1(d)(iii); *Sentencing Act 1997* (Tas) s 3(e).

⁷⁰⁸ Mackenzie, above n 706, 113.

⁷⁰⁹ *Ibid* 114–115.

⁷¹⁰ Arie Freiberg, *Fox & Freiberg’s Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 260.

In this vein, a sentence itself, and arguably the remarks made at sentencing more generally, can be characterised as a form of ‘moral communication’.⁷¹¹ In other words, sentencing provides an opportunity for the court to educate the offender and the wider community about ‘correct moral values’.⁷¹² Commenting on this, Warner suggests that judges’ remarks provide an opportunity for judges to play an ‘educative role’ in the criminal justice system.⁷¹³ Underlining this, Peršak described judicial communication as a ‘vehicle for passing on bits of data’ but also a means of ‘shaping public opinion on various matters’.⁷¹⁴

That said, while the value of judges playing an educative role is recognised, especially for some types of crimes,⁷¹⁵ there are questions about whether it is appropriate (or fair) to expect judges to play such a role.⁷¹⁶ Admittedly, even if judges’ sentencing remarks are an opportunity for education, the potential for any practical effect on social attitudes should not be overstated. The effect of sentencing on public perceptions of the seriousness of the offence, let alone merely the normative messages contained within sentencing remarks, is largely speculative.⁷¹⁷

Although Daly and Bouhours correctly observe that judges’ remarks are often reported by the press and may be published online,⁷¹⁸ issues around the availability and accessibility of sentencing remarks will, in all likelihood, limit the potential for

⁷¹¹ Kathleen Daly and Brigitte Bouhours, ‘Judicial Censure and Moral Communication to Youth Sex Offenders’ (2008) 25(3) *Justice Quarterly* 496, 500.

⁷¹² ALRC, *Same Crime, Same Time Report Sentencing of Federal Offenders*, Report No 103 (2006) [4.18]; Geraldine Mackenzie, Nigel Stobbs and Jodie O’Leary, *Principles of Sentencing* (Federation Press, 2010) 49.

⁷¹³ Kate Warner, ‘Sexual Offending: Victim, Gender and Sentencing Dilemmas’ in D Chappell and P Wilson (eds), *Issues in Australian Crime and Criminal Justice* (LexisNexis Butterworths, 2005) 248.

⁷¹⁴ Nina Peršak and Jože Štrus, ‘Legitimacy and Trust-Related Issues of Judiciary: New Challenges for Europe’ in Nina Peršak (ed), *Legitimacy and Trust in Criminal Law, Policy and Justice: Norms, Procedures and Outcomes* (Routledge Taylor & Francis Group, 2016) 96.

⁷¹⁵ Janis Wolak et al, ‘Online “Predators” and their Victims: Myths, Realities, and Implications for Prevention and Treatment’ (2008) 63(2) *American Psychologist* 111, 122 (explaining that, with respect to sexual offending against young people generally, ‘[i]t is valuable for the public to hear messages that reinforce norms’ including statements delivered with the authority of judicial office about the explanations for criminalisation).

⁷¹⁶ Daly and Bouhours, above n 711, 520 (suggesting that ‘[s]uch a role may not come easily to judges, and they may resist it as being inappropriate’).

⁷¹⁷ Mackenzie, above n 706, 115.

⁷¹⁸ Daly and Bouhours, above n 711, 519.

education. The public availability of sentencing remarks across Australia is variable (see, *Table 3* below). Thus, while a determined member of the public could, in theory, gain access to sentencing remarks in most instances, the media will be the more likely conduit between remarks and the public.

This means that the potential value of any normative messages contained in such sentencing remarks is likely to be influenced by the degree to which media outlets are interested in the case at hand, the amount of coverage given to the particular case, and the accuracy and quality of the reporting.⁷¹⁹

However, even if media reporting is sporadic and the circumstances in which large public audiences may read or hear messages or direct quotes from judges are not frequent, sentencing remarks may, nonetheless, have an educative value for the community, and thus represent an exception to the arguments made above. With respect to Chapter 3, sentencing remarks may fit under the Second Aim of primary prevention, thereby reducing the policy blind spot; while, for Chapter 4, sentencing remarks may provide a means through which the State publicises the law and gives fair warning of criminalisation. The current study therefore investigates this possibility.

⁷¹⁹ Mackenzie, above n 706, 150.

Table 3 – Public availability and accessibility of sentencing remarks in Australia

<i>Jurisdiction</i>	<i>Made publicly available on court website or by related department?</i>	<i>Time period available</i>	<i>All remarks?</i>	<i>Made available online in open access databases?</i>	<i>Time period available</i>	<i>All remarks for that period?</i>
Tasmania ⁷²⁰	✓	2008 – present	✓	✗	N/A	N/A
Victoria ⁷²¹	✓	2012 – present	✗**	✓	1993 – present	✗
South Australia ⁷²²	✓	4 weeks	✗**	✗	N/A	N/A
Western Australia ⁷²³	✓*	‘approximately a limited time’	✗**	✗	N/A	N/A
New South Wales ⁷²⁴	✓	2005-present	✗*	✓	2005 – present	✗
Queensland ⁷²⁵	✓	3 months	✗**	✗	N/A	N/A
Northern Territory ⁷²⁶	✓	3 months	✓	✗	N/A	N/A
Australian Capital Territory ⁷²⁷	✓	Unclear	✗	✓	1988 – present	✗*

Note: * ‘not routinely’ ** selected only.

⁷²⁰ Tasmanian Supreme Court, *Sentences 2008-present* Tasmanian Government <<http://catalogues.lawlibrary.tas.gov.au/textbase/SentSearch.htm>>.

⁷²¹ Victorian County Court, *Decisions of Note*, Government of Victoria <<https://www.countycourt.vic.gov.au/decisions-of-note>>.

⁷²² Courts Administration Authority of South Australia, *District Court – Sentencing Remarks* <<http://www.courts.sa.gov.au/SentencingRemarks/Pages/District-Court.aspx>>.

⁷²³ Western Australian District Court, *Sentencing Reasons* <http://www.districtcourt.wa.gov.au/C/criminal_sentencing_remarks.aspx?uid=6393-2680-8568-7315>.

⁷²⁴ New South Wales Department of Justice, *NSW CaseLaw* Government of New South Wales <<https://www.caselaw.nsw.gov.au/about>>.

⁷²⁵ Supreme Court Library Queensland, *Sentencing Remarks*, Queensland Government <<http://www.sclqld.org.au/caselaw/sentencing-remarks/>>.

⁷²⁶ Supreme Court of the Northern Territory, *Latest Sentencing Remarks*, Supreme Court of the Northern Territory <<http://www.supremecourt.nt.gov.au/remarks/>>.

⁷²⁷ Supreme Court of the Australian Capital Territory, *New Judgements and Sentences*, Supreme Court of the Australian Capital Territory <<http://www.courts.act.gov.au/supreme/news/new-judgments-and-sentences>>.

5.3 THE CURRENT STUDY

This empirical study contains a content analysis of a sample of 57 sentencing remarks from prosecutions for CEM accessing and possession offences between 2011 and 2015. Consistent with the observation made in the theoretical literature, a preliminary assessment of the sample confirmed that explanations given for both offence types turned on the act of viewing generally (e.g., an explanation was not premised on possession *per se*).⁷²⁸ Only sentencing remarks from the Victorian County Court and the Tasmanian Supreme Court were sampled. This decision was informed by a number of pragmatic reasons including the ready, public availability of sentencing remarks, and to provide an example of small and large jurisdiction within which different court hierarchies operate. While these jurisdictions are not homogenous in their sentencing regimes and practices, this study is exploratory, rather than comparative.

5.3.1 Research Design

Tasmanian sentencing remarks were obtained from the publicly accessible *Supreme Court of Tasmania Sentences 2008* database, while the Victorian sentencing remarks were obtained from the *Australasian Legal Information Institute (AustLII)* database. Two selection protocols were applied to the collected data. One, only first-instance decisions were included in the sample, on the basis that appeal cases are unlikely to generate normative messages about why the viewing of CEM is ‘morally wrongful’ in the first instance. Two, only remarks from prosecutions for the offences of accessing and possession were sampled. This meant that cases that melded judges’ discussion of CEM-viewing with other sexual crimes were excluded.

Searches of the Tasmanian database returned 66 documents, of which 28 satisfied the selection protocols. Searches of the Victorian database returned 108 documents, of which 29 satisfied the selection protocols; in no small part, because a large proportion of the cases within the Victorian dataset were for prosecutions that, in addition to accessing and possession of CEM, included other offences. As a final point, it is noted that the latter may not be a complete dataset, as not all County Court decisions are

⁷²⁸ Gillespie, above n 50, 39 (noting the behaviours are ‘largely analogous’).

made public. That said, this database is the principal public repository for such decisions.⁷²⁹

5.3.2 Methodology

A content analysis methodology was used to analyse the sample of sentencing remarks (N=57). Simply put, content analysis is a research technique that enables ‘making replicable and valid inferences from texts (or other meaningful matter) to the contexts of their use’.⁷³⁰ In other words, texts that have a meaning for others were examined, and specific inferences were drawn about the messages they contain for the purpose of this study. This methodology was appropriate as sentencing remarks are either a full or a ‘partial and selected’ textual record of sentencing in the form of a document.⁷³¹ This method meant remarks could be systematically examined to identify and catalogue the messages they contained.⁷³² In turn, this method enabled analysis and interpretation.⁷³³

In line with the stipulation that courtroom speech must be situated rather than abstracted, each sentencing remarks document was examined as a complete text.⁷³⁴ This was practical as sentencing remarks are relatively short (between 1000 and 4000 words), and because their structure is a matter of discretion for the individual judge, there was no logical way to segment the text that would aid analysis.

A situated approach also ensured focus on references to normative messages about why the viewing of CEM is ‘morally wrongful’ in the first instance, rather than explanations judges might provide to justify the imposition of the particular penalty itself. Admittedly, there is the potential for a conceptual overlap here, although for the purpose of this study it was not necessary to distinguish definitively between such references. It is enough to indicate that, in the main, the former involves *ex ante*

⁷²⁹ Victorian County Court, *Decisions of Note*, Government of Victoria <<https://www.countycourt.vic.gov.au/decisions-of-note>>.

⁷³⁰ Klaus Krippendorff, *Content Analysis: An Introduction to Its Methodology* (Sage, 3rd ed, 2013) 24.

⁷³¹ Daly and Bouhours, above n 711, 505.

⁷³² Michael G Maxfield and Earl R Babbie, *Research Methods for Criminal Justice and Criminology* (Cengage Learning, 7th ed, 2015) 348.

⁷³³ Tracy G Harwood and Tony Garry, ‘An Overview of Content Analysis’ (2003) 3 *The Marketing Review* 479, 479.

⁷³⁴ Clare MacMartin and Linda A Wood, ‘Sexual Motives and Sentencing: Judicial Discourse in Cases of Child Sexual Abuse’ (2005) 24(2) *Journal of Language and Social Psychology* 139, 141–142.

explanations for criminalisation, while the latter relates to *post factum* justifications for the imposition of the particular penalty.

5.3.3 Procedure and Coding

The content analysis was performed using *QSR International's* qualitative research software *NVivo* 11 for Macintosh (*NVivo*). Because this investigation was novel, an inductive approach was taken in the first instance, with messages coded as they emerged from the data.⁷³⁵ To identify a relevant message — or data segment — the manifest or 'visible surface content' of the data was coded, rather than any additional 'underlying meaning' of the text.⁷³⁶ Described as a 'semantic approach', this method ensured, as much as possible, that the coded data segments reflected what the judge said.⁷³⁷

Once identified data segments were coded, the data segments were sorted into broader categories with reference to theme, namely, the 'central idea that emerge[s] from the data'.⁷³⁸ These themes were then sorted into hierarchical categories using a coding rule to help ensure consistency and minimise subjectivity as much as possible.⁷³⁹ This involved distinguishing messages about CEM involving a real child from virtual-CEM.

Initial reading of the sentencing remarks indicated that, in a small minority of cases, judges reproduced secondary sources, including second reading speeches, explanatory memoranda and case law from their own, and other jurisdictions. These explanations fell outside the scope of this analysis, as even where the judge expressly adopted the statement, the subject matter of the quote was not limited to viewing offences.

After completing the first round of coding, the data were re-coded three days later to check the reliability of the coding — the 'test-retest method'.⁷⁴⁰ The face-validity of

⁷³⁵ David R Thomas, 'A General Inductive Approach for Analyzing Qualitative Evaluation Data' (2006) 27(2) *American Journal of Evaluation* 237, 241.

⁷³⁶ Maxfield and Babbie, above n 732, 348.

⁷³⁷ Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) *Qualitative Research in Psychology* 77, 84.

⁷³⁸ Maggie Walter, *Social Science Research Methods* (Oxford University Press, 3rd ed, 2013) 324.

⁷³⁹ *Ibid* 263–264.

⁷⁴⁰ Maxfield and Babbie, above n 732, 125.

the coding in both rounds was checked. This involved examining the data segments in each theme to ensure they were accurately interpreted and categorised with reference to the coding rule. As a further means to check that all relevant data segments were included, a text search for key words within each theme was conducted, with results then manually examined.

To aid reporting and discussion, the themes were subsequently categorised with reference to the Effect Categories identified previously in this thesis (see, Chapter 2). For material involving a real child, this included the *Viewer*, *Other Offenders*, the *Child Victim* and *Society* — the categories were the same for a virtual child except for the *Child Victim* (see, 2.1).

5.4 RESULTS

This study is exploratory. The reported results are not intended as a criticism of any individual judge. The purpose of this study was to determine whether sentencing remarks contain normative messages about why the viewing of CEM is ‘morally wrongful’, and if so, what the educative value of such messages might be for the community. To reinforce this point, neither the identities of the judges, nor the names of the cases, are referenced below.

As noted above, a total of 57 sentencing remark documents (Tasmanian n=28; Victorian n=29) were collated, following the selection protocols. The cases were spread evenly across the years included in the study, with between 9 and 14 cases collated for each calendar year (2011–2015). With respect to the type of material, most cases involved a real child (Tasmania n=24; Victoria n=25), with only a small proportion of sentencing remarks also including virtual-CEM (Tasmania n=4; Victoria n=4).

With respect to CEM involving a real child, the majority of remarks (81%) contained one or more normative messages, with a total of 90 individual references identified overall. Among these 90 individual references, there were nine main types of message: *Acknowledge Victims* (n=35), *Further Effect on Victims* (n=11), *Market* (n=13), *Encouragement* (n=13), *Demand* (n=6), *Protect Children* (n=6), *Community Standards* (n=3), *Normalisation* (n=2) and *Desensitisation* (n=1). Almost one in five

remarks (n=11 (19%)) contained no normative messages about why the viewing of CEM was ‘morally wrongful’ (Tasmania n=2; Victoria n=9).

Subsequent analysis revealed that these nine main types of messages corresponded to the Effect Categories identified in Chapter 2: the *Viewer*, *Other Offenders*, *Society* and the *Child Victim*. The two figures below show the breakdown of the sample by Effect Category and type of message (*Figure 1*), and by aggregated percentage in each Effect Category (*Figure 2*).

Figure 1 – Effect Category and messages by times references in sample (n)

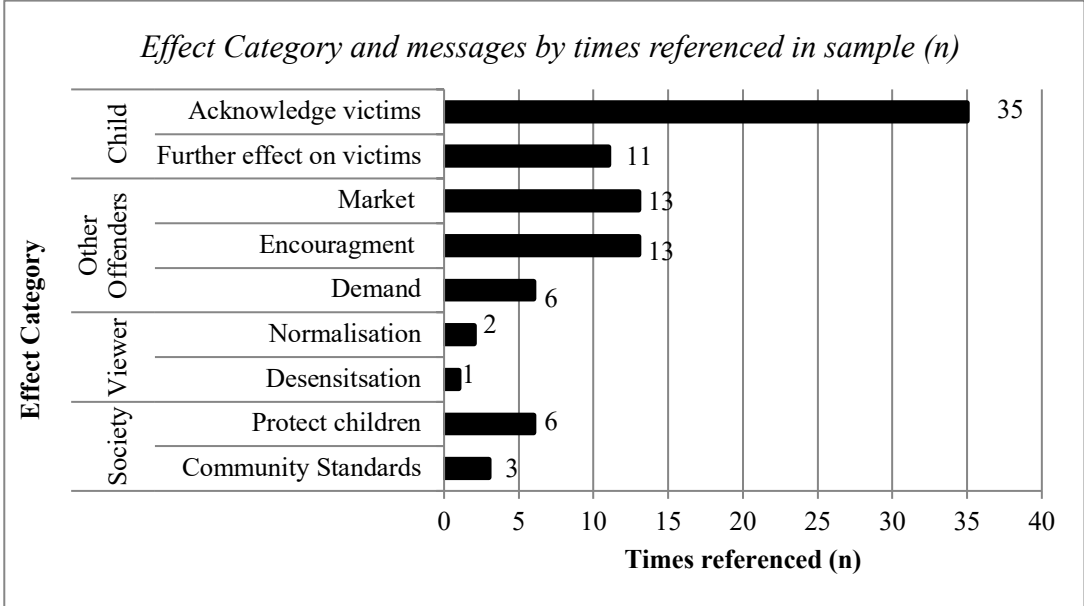
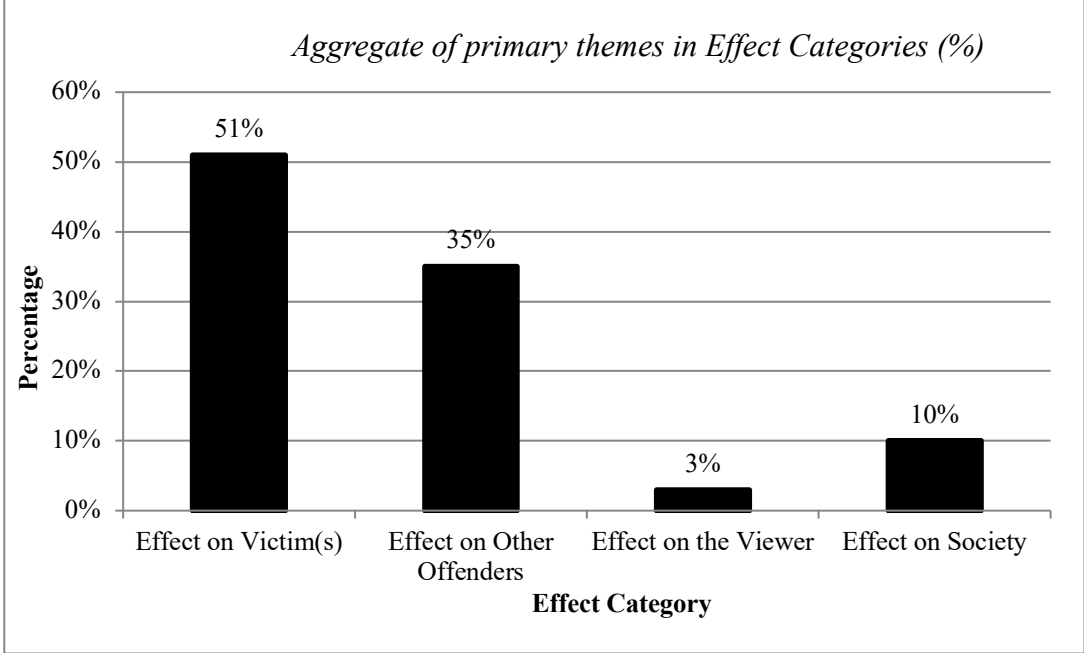


Figure 2 – Aggregate of primary themes in Effect Categories (%)



As these figures demonstrate, the most frequently cited type of message related to the Effect Category of the *Child Victim(s)* (n=46 (51%)). There were two distinct types of messages within this category: *Acknowledge Victim* and *Further Effect on Victim(s)*. The former type of message was referenced 35 times and was the only message in 13 (23%) of the sentencing remarks (Tasmania n=8; Victoria n=5).

This type of message emphasised the importance of acknowledging the past suffering that the individuals who are depicted in the material have experienced. For example, ‘It is obvious that children who are the subject of such material must suffer great harm’ (C8). The latter type of message was referenced 11 times and, in contrast to the first message, emphasised the further, or additional, effect that viewing CEM has on the child(ren) shown in the material. For example, ‘The victims are re-victimised every time their images are accessed by people like you’ (C51).

The second most frequently referenced type of message related to the Effect Category of the *Other Offender* (n=32 (35%)). Messages within this category were of three main types: that viewing creates a *Market* for CEM (n=13); that the behaviour of the viewer provides *Encouragement* to other offenders (n=13); and, that the behaviour of the viewer creates *Demand* (n=6). While, as discussed below, these messages are essentially components of the same construct, they are reported separately here to facilitate their description. Respectively, key examples of these types of messages are:

- *Market*: ‘Those who access these images create a market for this exploitation to continue’ (C46);
- *Encouragement*: ‘Your crime of possessing child pornography fuels and encourages this criminal activity’ (C31); and,
- *Demand*: ‘To be in possession of them, without more, contributes to a demand for them and the demand perpetuates the abuse of children’ (C18).

There were fewer messages relating to the remaining two Effect Categories, although there were more messages about the *Effect on Society* (n=9 (10%)) than the *Effect on the Viewer* (n=3 (3%)).

Under the *Effect on Society*, the two main types of messages were *Protect Children* (n=6) and *Community Standards* (n=3). The former characterised the wrongfulness of viewing with reference to a broader social value; the need to protect children generally. For example, '[t]he legislation under which you have been charged is designed to provide some protection for these children who clearly cannot protect themselves' (C9). The second type of message, *Community Standards*, referred to notions of public morality, such as, '[t]he community cannot, and will not, tolerate the sexual abuse of children' (C33).

There were also two main types of messages under the Effect Category of the *Viewer*. The first type of message took the form of concern about 'normalisation' (n=2) while the second focused on 'desensitisation' (n=1). While related, the tenor of concern varied. For example, with the respect to the former in C10, the judge stated that '[t]he material when produced may give the impression that the behaviour depicted is in some way normal'. In contrast, with respect to the latter, the judge remarked in C48 that '[t]here may be a level of becoming somewhat desensitised which means that there is a progression from adult to child pornography and from older children to younger'.

With respect to virtual-CEM, only eight sentencing remarks included offending involving virtual-CEM, and in only two instances did the sentencing remarks contain specific messages about the wrongfulness of viewing virtual-CEM. Among these remarks, there were five types of messages, three of which fell within the category *Effect on Society*, with the further two falling within the category *Effect on the Viewer*. The four messages within the former category were: *Risk for Others* (n=1), *Degrades Children in general* (n=2) and *Normalisation* (n=1). Examples of each of these explanations include:

- *Risk for Others*: 'even material of that type carries with it significant risks if it falls into the wrong hands' (C3);
- *Degrades Child in general*: 'even cartoon material potentially degrades children in general' (C7); and,
- *Normalisation*: 'creates an impression that what is depicted is somehow normal' (C7).

Under the latter category, the single message was that viewing virtual-CEM may incite the viewer (*Incite* (n=1)). The judge in this instance explained that despite the fact that some of the material the offender viewed did not depict a real child, the behaviour ‘remains serious conduct, as it has the tendency to ... incite’ (C3).

5.5 DISCUSSION

This study involved an explorative analysis of four years of publicly available sentencing remarks from two jurisdictions. As a result, there are valid questions about whether these findings are representative of these jurisdictions, not to mention judicial practice in Australia more widely. As judges were not asked, it is not possible to say whether the fact that some sentencing remarks did not contain normative messages reflects a deliberate intent by judges to take an ‘educative role’ in this context.⁷⁴¹ Nor is it possible to draw any firm conclusion about whether the 11 remarks in which no messages were given signal a degree of judicial resistance to playing such a role,⁷⁴² although there was no pattern evident to suggest a particular judge actively took this stance.

Leaving aside these limitations, the findings of this study provide preliminary confirmation of the possibility, raised above, that judicial sentencing remarks represent an opportunity to educate the community. To further examine this, the discussion first explores the educative value of the messages identified above, against the literature review undertaken in Chapter 2. Next, attention turns to discuss the limitations of such messages to dispel ambiguity in the Australian community about why the viewing of CEM is itself morally wrongful. This discussion concludes by examining how such limitations might be remedied.

5.5.1 Remarks about Material Involving a Real Child

As noted above, by far the most common type of message among this sample was *Acknowledge Victims*, which falls under the Effect Category of the *Child Victim*. Messages of this type emphasised the harm perpetrated on the child victims by individuals who abuse, produce and/or distribute the material that the offender is

⁷⁴¹ Warner, above n 713, 233, 248.

⁷⁴² Daly and Bouhours, above n 711, 520.

prosecuted for viewing (i.e., possessing or accessing). For instance, in the example provided above, the judge stressed that it was ‘obvious’ that children who are depicted in CEM ‘suffer great harm’ (C8).

In the literature, the explanation put forward by O’Donnell and Milner, that one of the harmful effects of CEM is that victims do not have a voice and are invisible, aligns most closely to this type of message.⁷⁴³ While perhaps acknowledgment of the harm done to the child victims by other offenders in sentencing remarks is one way to combat this, there is a question about the educative value of such messages.

Arguably, unless an attempt is made to specify why the behaviour of the offender who is being sentenced is morally wrongful, in and of itself, this type of message may reinforce, rather than dispel, ambiguity about the harm involved in ‘just viewing’ CEM online. By focusing on the original abuse suffered by the child, this type of message may imply that others do the real harm. Even though, as reported above, this type of message often appears in concert with other types of messages, almost one in four sentencing remarks in this sample only contained this type of message, limiting the educative value of the sentencing remarks.

While the second type of message in this category, *Further Effect on Victims*, was referenced only a third as often as *Acknowledge Victims*, it is arguably more likely to dispel ambiguity. This is because this type of message seeks to specify why the behaviour of the viewer is morally wrongful by linking the behaviour of a viewer and the effect of such behaviour on the child. For instance, in the example above, the judge describes how the viewer’s behaviour ‘re-victimised’ the child (C51).

This type of explanation is one of the most developed in the literature (see, 2.5), although a difference is evident. In the literature, the potential for an effect turns — in the main — on the child having knowledge that the material exists and is being viewed (see, 2.5.1). Despite this, the question of whether the child shown in the material viewed by the offender had knowledge was barely mentioned. Only one judge prefaced their message in this way (i.e., ‘if the child has knowledge...’).⁷⁴⁴

⁷⁴³ O’Donnell and Milner, above n 186, 71–72.

⁷⁴⁴ Cf *New York v Ferber* 458 U.S. 747 (1982) [759] (explaining that the effect on a child from viewing behaviour derived from the fact that ‘[a] child who has posed for a camera must go through life *knowing* that the recording is circulating within the mass distribution system for child pornography’);

On its face, this may not be of much consequence. It may simply indicate that judges ascribe to the view that irrespective of knowledge, the child will be affected by the act of viewing,⁷⁴⁵ or that the potential for knowledge is enough.⁷⁴⁶ Yet, introducing a note of caution in this context, Ost argues that ignoring or not addressing the issue of knowledge leaves an explanation open to challenge.⁷⁴⁷ A practical effect of which may be to undermine the strength of this type of message where either the circumstances that make it likely that the child or children have knowledge are not identified, or an alternate explanation, not predicated on knowledge, is also not identified.

With respect to the latter point, it is perhaps surprising that not a single sentencing remark in this sample contained messages that turned on the rights of the child. As noted previously, in the literature, theorists contend that viewing contravenes a child's right to privacy, dignity and equality, irrespective of knowledge (see, 2.5.1 (c)). The potential significance of this for the arguments made in Chapter 3 and Chapter 4 is returned to in the final chapter of this thesis.

As reported above, the second most frequently referenced type of message related to the Effect Category of the *Other Offender*. Messages within this category were of three main types: *Market*, *Encouragement* and *Demand*. As noted above, these messages are components of the same construct, and such terms are used more or less interchangeably in the literature (see, 2.3). There is variation in the literature in regards to the terms used to describe the underlying dynamic, but the premise is the same; the behaviour of the viewer triggers other offenders to exploit and abuse children (see, 2.3.1). Yet, theorists are divided on the condition by which this dynamic is triggered (see, 2.3.1).

Briefly put, on one side, theorists contend that only a monetary payment provides a sufficient condition, while on the other, theorists also argue that there are other forms of 'payment' (e.g., behavioural validation)⁷⁴⁸ that provide a sufficient condition to

Osborne v Ohio 495 U.S. 103 (1990) [1697] (explaining that the continued existence of CEM in which a child appears 'causes the child victims continuing harm by haunting the children in years to come').

⁷⁴⁵ See, eg, Ost, above n 232, 118.

⁷⁴⁶ Gillespie, above n 50, 38.

⁷⁴⁷ Ost, above n 232, 119.

⁷⁴⁸ Ost, above n 219, 453.

trigger this dynamic. The question of whether the behaviour of the offenders in this sample represented such a condition was largely ignored. In the Australian legal context more broadly, this is perhaps not surprising. The market explanation is well entrenched,⁷⁴⁹ and the viewing of CEM has been characterised as a commercial activity, irrespective of a monetary transaction.⁷⁵⁰

However, if this dynamic is invoked unquestionably, the potential for ambiguity to undercut the educative value of such a message exists. For example, the *Market* message described above turns on an assertion that those individuals who access CEM ‘create a market for this exploitation to continue’ (C46). There is no explanation provided of the condition by which the offender’s behaviour triggers this. Even if members of the public are familiar with the concept of a market per se, it may well be a stretch to expect the public to appreciate that conditions beyond a monetary payment might or could also be a sufficient trigger — particularly if they are not even mentioned. Put another way, the use of this type of message, without further explanation, may not resonate with the public, and thereby perpetuate ambiguity about why the behaviour of the viewer is morally wrongful. Underlining this, sentencing remarks in this sample often contained reference to the fact that the offender did not pay for the material, which, while relevant to determine the quantum of a sentence, may compound ambiguity.⁷⁵¹

As the types of messages under the remaining two Effect Categories were only referenced a handful of times, they will only be discussed briefly.

The third most frequently referenced type of message fell under the category of *Society*, and took two forms: *Protect Children* and *Community Standards*. As the examples provided above indicate, these types of messages characterise the offender’s behaviour as morally wrongful on the basis that the behaviour attacks core values: the protection of children and the intolerance of child sexual abuse. In making these

⁷⁴⁹ See, eg, *Young v Western Australia* [2011] WASCA 13 [50] (Mazza J) (stating in response to a challenge about the existence of a market for CEM in this case, Mazza J stated that despite ‘no actual evidence’ of a market for CEM being presented to the court, ‘[t]he existence of the market for child pornography is so well-known, and the purpose of its production and the impact upon children who are involved in it are so obvious that no evidence of these things is required’).

⁷⁵⁰ *R v Oliver* [2003] 1 Cr App R 28 [11].

⁷⁵¹ Warner, above n 93, 389.

statements, judges did little more than assert their validity. This is perhaps not surprising given that, even in the literature, the compelling force of the protection discourse around children is noted;⁷⁵² although alternative points of view are also given (see, 2.4.1). In other words, the force of this discourse may have rendered the need for further explanation unnecessary in the mind of a judge. This interpretation chimes with the view taken in judicial commentary internationally.⁷⁵³

Explanations within the Effect Category of the *Viewer* are commonly used in other contexts.⁷⁵⁴ In this sample, however, only three per cent of messages referred to the possibility that viewing could affect the viewer. The two types of messages turned on the inference that the seriousness of the offender's behaviour could escalate as a result of a perception that the behaviour shown in CEM was normal, and as the viewer became desensitised to the images. In the literature, the main types of explanation under this category turn on the potential for viewing to incite child sexual abuse, or in the alternative, foster attitudes that increase the likelihood of such offending (see, 2.2.1). Australian judges have also pointed to the former possibility.⁷⁵⁵

These explanations are criticised due, not least, to the unsettled evidence base (see, 2.2.1). It may be that the scarcity of these types of messages in this sample is a nod to such criticism; rather than wading into such debate, judges do not comment. Another possibility, and perhaps a more likely explanation, is that since the offender standing before the judge is only being sentenced for viewing such material, judges see the incongruity of pointing to the potential that the offender might commit other types of offences to explain why their behaviour is morally wrongful.

5.5.2 Remarks about Material Involving a Virtual Child

As noted above, while none of the sentencing remarks in this sample were for virtual-CEM only, there were eight remarks in which an offender was sentenced for

⁷⁵² Ost, above n 270, 232.

⁷⁵³ See eg, *R v Sharpe* [2001] 1 SCR 45 [12–13] (L'Heureux-Dubé, Gonthier and Bastarache JJ) ('[a]lthough not empirically measurable, nor susceptible to proof in the traditional manner, the attitudinal harm inherent in child pornography can be inferred from degrading or dehumanizing representations or treatment. Expression that degrades or dehumanizes is harmful in and of itself as all members of society suffer when harmful attitudes are reinforced').

⁷⁵⁴ Gillespie, above n 188, 230.

⁷⁵⁵ See, eg, *Liddington* (1997) 97 A Crim R 400 [409] (Ipp J) (stating 'people with pederastic inclinations could be stimulated to commit pederastic acts on viewing these images').

behaviour that included the viewing of virtual-CEM. Only in two instances among these eight remarks did the judge provide messages about why this behaviour was morally wrongful. Falling under the Effect Categories of the *Viewer* and *Society*, the types of messages identified largely correspond to the types of concerns that are expressed in the literature, albeit that in the latter context they are maligned. In brief, explanations under the former category attract criticism for turning on little more than speculation that exposure to virtual-CEM incites, or even influences, an individual to commit acts of child sexual abuse (see, 2.2.2). In turn, explanations under the latter category are similarly maligned, particularly when applied to interactions with virtual-CEM beyond production and distribution, and because they but up against expressions of freedom of speech (see, 2.4.2).

Given this, the more interesting point of discussion is the infrequency with which judges include messages about virtual-CEM in their sentencing remarks. It may be that the lack of judicial comment evidences a degree of uncertainty about, or even resistance to, playing an educative role in this context. This could reflect the view that the harm involved in viewing virtual-CEM is too ‘indirect and remote’.⁷⁵⁶ Or, it could indicate that judges simply give precedence to commenting on material that involves a real child. As none of the sentencing remarks in this sample involved virtual-CEM only, and this study did not ask judges why they did not comment, these suggestions are merely speculation. Nonetheless, if nothing else, the apparent infrequency with which messages about why the viewing of virtual-CEM is morally wrongful appear in sentencing remarks, despite the offender doing so, is a missed opportunity for communication and reduces the educative value of such remarks.

5.5.3 Three Limitations to the Educative Value of Sentencing Remarks

Most sentencing remarks in this sample contained at least one normative message about why the viewing of CEM involving a real child was morally wrongful, suggesting, at least *prima facie*, that the sentencing remarks in this sample have an educative value. However, there are three limitations that restrict the educative value of sentencing remarks to dispel ambiguity about why the viewing of CEM is morally wrongful.

⁷⁵⁶ Ost, above n 270, 245.

The first of these is that, as noted above, there are issues of access and availability that affect dissemination and reduce the likelihood that any normative message contained in sentencing remarks would be heard, or read, by a member of the public (see, 5.2).

The second limitation turns on the fact that a proportion of sentencing remarks in this sample did not contain any normative messages about why the behaviour of the offender was morally wrongful at all. If nothing else, this is an indicator that an opportunity to dispel ambiguity has been missed. This limitation was evident for material involving a real and a virtual child, and is arguably undesirable for both. For the former, there are a substantial number of prosecutions and thus perhaps more reason for comment, while for the latter, the fact there are fewer prosecutions means there is less opportunity for comment and more reason to do so when an opportunity arises.

With respect to the latter, it is worthwhile noting that there is substantial controversy in the literature about the validity of criminalising the viewing of virtual-CEM. It may be that the lack of judicial commentary about such material reflects a degree of reluctance to wade into this debate, as suggested above (see, 5.5.2). This does not however change the fact that in Australia, viewing this type of material is a criminal offence, subject to punishment with stiff penalties.

The third limitation relates to the types of messages judges use in their sentencing remarks and, specifically, that they may foster, rather than dispel ambiguity around the moral wrongfulness of viewing CEM. This is best illustrated by use of an example. The primary message under the Effect Category of the *Child Victim* is *Acknowledge Victims*. As discussed above, by focusing primarily on the actions of others who perpetrated the original abuse, this type of message may reinforce the notion that there is little harm in ‘just viewing’ CEM online. In other words, others do the real harm. This limitation is particularly relevant if no other message is provided to specify why the behaviour of the viewer, *in and of itself*, is morally wrongful. As discussed earlier, there were similar limitations with respect to messages within the other Effect Categories.

5.5.4 Remedying Limitations of Sentencing Remarks

As noted above, the first limitation of sentencing remarks is that there are issues of access and availability that affect dissemination, and reduce the likelihood that any normative message contained in a sentencing remark would be heard or read by a member of the public (see, 5.2). With respect to the former point, *Table 3* above provides an overview of current practice in Australia with regard to the availability and accessibility of sentencing remarks. If these jurisdictions were to follow the lead of Tasmania, this would go some way to remedying this issue. That said, the question of media reporting remains an unknown, and thus an area for further research.

Leaving aside the first limitation, remedy of the latter two limitations is relatively straightforward. To remedy the second limitation requires that judges ensure that they include a normative message in each sentencing remark, while to remedy the latter could be as simple as ensuring that at least one of the messages in the remarks focuses explicitly on the behaviour of the viewer, provided it also adheres to any further conditions. For the example discussed above, this could mean that if one type of message was *Acknowledge Victims*, then the other type of message should focus on the effect of viewing, for instance, *Further Effect on Victims*. A further point is that, as noted above, a message should reflect any additional condition that applies to the particular explanation. For this example, this would require addressing the question of whether the child has knowledge, and if in issue, identifying an alternative basis that does not predicate any effect on the child having knowledge (e.g., rights).

5.6 CONCLUSION AND FUTURE RESEARCH

This chapter investigated whether, beyond merely indicating the criminality of viewing CEM per se, judges' sentencing remarks contain normative messages about why the viewing of CEM is morally wrongful. In doing so, this chapter considered what the educative value of such remarks might be for the community.

As noted above, most sentencing remarks in this sample contained one or more normative messages and thus, on their face, have an educative value. Three limitations may reduce the value of remarks to dispel ambiguity about why the viewing of CEM is morally wrongful. These included: issues around the access, availability and dissemination of sentencing remarks and any normative messages

they contain; that not all sentencing remarks contain normative messages; and, that some of normative messages used in sentencing remarks may foster, rather than dispel, ambiguity around the moral wrongfulness of viewing CEM.

The lack of research in this area means it is not clear to what extent the potential educative value of sentencing remarks are restricted by these limitations. Even so, this study confirms that such remarks may represent the exception foreshadowed above, because judges' remarks offer a unique ongoing opportunity for the State to explain to the offender and the wider community why the behaviour is morally wrongful.

Thus, this study has two major implications for the theoretical lenses introduced earlier in this thesis. For Chapter 3, the findings of this study mean that the policy blind spot is not quite as large as suggested earlier in this thesis (see, 3.3). Although, even if this blind spot is slightly smaller because of sentencing remarks, the limitations identified in this study mean it is very unlikely that such remarks are an effective means through which to affect the likelihood of onset for an Opportunistic Offender, a point returned in in Chapter 7.

Turning to Chapter 4, it was suggested that sentencing remarks might be a source of ongoing communication between the State and the citizen about the criminality of viewing CEM. The significance being that such remarks might be a means through which the law was publicised and fair warning of criminalisation was given to citizens (see, 4.5). The results of this study suggest that even if sentencing remarks are a possible source of communication, the limitations identified above restrict their potential reach and effectiveness.

Further to exploring whether the patterns identified in this sample of sentencing remarks are evident in other jurisdictions, four further areas for future research are indicated.

One, in the Australian context, it would be valuable to explore judicial perceptions of why the viewing of CEM is morally wrongful, and identify whether some judges are in fact reluctant to comment on virtual-CEM. In doing so, a comparison between sentencing remarks from other Australian jurisdictions could shed light on whether there are structural, or perhaps cultural, issues that play a role. Such exploration could also assess the extent of judicial awareness of issues around public perceptions of the

viewing of CEM in Australia, and as such, the desirability of adopting an educative role.

Two, it would be useful to examine media reporting of the sentencing of offenders who are convicted of viewing offences in Australia to determine if, and how well or otherwise, the normative messages in sentencing remarks are communicated to the wider community through this medium. This would enable further comment, and perhaps an indication of how to remedy the first limitation of sentencing remarks (see, 5.5.3).

Three, as this study only examined remarks made about the viewing of CEM from two jurisdictions, future research could meaningfully explore what judges say about other types of offences in Australia. In particular, for offences where there may be ambiguity about the criminality of such behaviour within the community.

Lastly, and with potentially broader implications, this study underlines the potential for the sentencing remarks of judges to have an educative value for the community. This raises questions about judicial practice in other jurisdictions, including whether and how judges' comments are disseminated, and what their educative value might be.

Statement of Co-Authorship

The following people contributed to the publication of parts of the research that appear in this chapter.

Candidate: Charlotte Mary Hunn, Faculty of Law, University of Tasmania

Author 2: Dr Helen Cockburn, Faculty of Law, University of Tasmania

Author 3: Dr Caroline Spiranovic, Faculty of Law, University of Tasmania

Author 4: Associate Professor Jeremy Prichard, Faculty of Law, University of Tasmania

Author details and their roles

Article title: *Exploring the Educative Role of Judges' Sentencing Remarks: An Analysis of Remarks on Child Exploitation Material*

The candidate was the primary author and contributed 70 per cent of the preparation of the above article, parts of which draw on the empirical research and discussion contained in this chapter. Authors 2, 3 and 4 each contributed 10 per cent to the interpretation of the empirical work and in critically revising the article for publication.

We the undersigned agree with the above stated 'proportion of work undertaken' for the above published (or submitted) peer-reviewed manuscript contributing to this thesis.

Signed:
Associate Professor Jeremy Prichard
Supervisor
Faculty of Law, University of Tasmania

Date: 30 May 2018

Signed:
Professor Tim McCormack
Head of School/Dean
Faculty of Law, University of Tasmania

Date: 31 May 2018

CHAPTER 6: SURVEYING PUBLIC PERCEPTIONS

6.1 INTRODUCTION

This thesis has contended that there is a policy blind spot in the State response to tackling the online viewing of CEM in Australia (see, 3.3). Although Australia has a strategy of primary prevention with respect to CEM offending, the scope of this strategy is limited to reducing the likelihood that children will be victimised, with little if any attention given to preventing onset, that is, the first instance of ‘deliberate viewing’.⁷⁵⁷ Respectively, these areas were characterised as the First Aim and the Second Aim of primary prevention (see, 3.2). This thesis has explored the possible implications of the policy blind spot with respect to the Second aim of primary prevention using two theoretical lenses. Borrowing the construct of the Opportunistic Offender from Situational Crime Prevention theory, Chapter 3 argued that the current policy settings may not reduce ambiguity about the criminality and morality of viewing CEM; factors that may affect the offending readiness of an Opportunistic Offender.⁷⁵⁸ Underlining the significance of this, Chapter 4 introduced key legal theory principles to demonstrate how this could indicate Australia is falling short of its duty to publicise the law, and ensure citizens have fair warning of criminalisation.

This chapter presents an exploratory study of what Australian internet users know and think about the criminalisation of the viewing of CEM online. This study takes place against preliminary Australian research that suggests a disjuncture between public perceptions and the criminality of this behaviour (see, 1.4 generally). Informed by such suggestion, this thesis proposed that public perceptions research was a means through which to explore the merit of the arguments made under the theoretical lenses introduced in Chapter 3 and Chapter 4.

To re-cap, Chapter 3 began by identifying a public policy blind spot within the scope of primary prevention; a lack of attention to prevent the first time use of CEM.⁷⁵⁹ To make the case for addressing this blind spot, this chapter examined issues around how offending onset may occur, why an individual may begin offending and who such

⁷⁵⁷ Prichard, Watters and Spiranovic, above n 3, 587.

⁷⁵⁸ Cornish and Clarke, above n 507, 62 (criminality) and 67 (moral ambiguity).

⁷⁵⁹ Wortley and Smallbone, above n 50, 89.

offenders are (see, 3.4 generally). Using the construct of the Opportunistic Offender from Situational Crime Prevention theory, it was argued that a potentially valuable opportunity to reduce, if not prevent, offending onset may be being overlooked because of this blind spot. In making this point, the final part of this chapter considered the role of public perceptions given the vulnerabilities of the Opportunistic Offender (see, 3.6).

In turn, Chapter 4 examined the relationship between the State and the citizen with respect to two fundamental duties that rest with the State: the duty to publicise the law, and the duty to give fair warning to citizens of criminalisation. It was argued that these two duties provided a principled basis upon which to critique the existence of the blind spot identified in Chapter 3. In doing so, it was contended the existing public perceptions research provided grounds upon which to question whether the State is fulfilling these duties with adverse implications for crime prevention.

Against this background, this sixth chapter presents original empirical research to shed new light on public perceptions in this area. The study involves a sample of 504 Australian internet users who fit the construct of the ‘digital native’ (see, 1.5).⁷⁶⁰ This study gauges levels of knowledge about the criminality of viewing key types of material definable as CEM under Australian law, and explores areas of public awareness against the Effect Categories identified in Chapter 2. By mapping public perceptions in terms of knowledge of the criminality of viewing CEM and awareness of explanations for criminalisation, this study breaks new ground and offers insights that significantly expand the existing research in this area.

This chapter begins by setting out the research aims and the method used to conduct this study. In reporting results, the quantitative findings with respect to knowledge of the law are reported first, and the key gaps in knowledge are identified. Next, the quantitative and qualitative findings relating to participants’ own perceptions of the effects of viewing within the Effect Categories are outlined, and key gaps in awareness identified. In this chapter, discussion of the results is limited to the previous research, and consideration of how these findings compare with and expand the existing research. Discussion of the implications of findings for the theoretical

⁷⁶⁰ Prensky, above n 178, 2.

lenses is explored in Chapter 7. This chapter concludes by addressing the limitations of this research.

6.2 RESEARCH AIMS

As outlined in Chapter 1, while the prospect of a disjuncture between public perceptions and CEM law has existed in judicial and academic discourse for many years (see, 1.4), it remains largely unexamined empirically. As noted above, very little research exists into what the public knows about the criminality of viewing CEM online, or public perceptions of what definitions of such material encompass (1.4.2). Very little is also known, in general, about public perceptions of the explanations for criminalisation or, in lay terms, the reasons why the viewing of CEM is a criminal offence (see, 1.4.3). This thesis aims to explore the perceptions of a specific sub-set of the community, namely, the perceptions of ‘digital natives’ – a concept examined elsewhere in this thesis (see 6.4). As such, the aims of this research are:

1. To gauge digital natives’ perceptions of the criminality of viewing a range of online material definable as CEM under Australia law, and identify key gaps in knowledge; and,
2. To explore digital natives’ own awareness of explanations for the effects of viewing material involving a real child and a virtual child on the *Viewer, Other Offenders, Society* and the *Child Victim*, and identify key gaps in awareness.

6.3 RESEARCH METHOD

6.3.1 The Survey as a Research Tool

As this area of research is nascent and this study is primarily exploratory, surveys or interviews would have been suitable research methods. A survey was chosen as the preferred method of data collection because, in line with the aims of this thesis, the primary intention was to describe levels of knowledge and awareness, rather than explore the secondary question of why a participant does not know, or is unaware, of

a particular explanation.⁷⁶¹ In addition, the sensitive topic under investigation meant administering an online survey, as opposed to face-to-face, could be expected to produce more ecologically valid findings.⁷⁶² An online survey fosters participants' perceptions of privacy.⁷⁶³ This means responses are more likely to be honest and less influenced by social desirability expectations.⁷⁶⁴ Indeed, researchers have concluded that the use of online surveys for sensitive topics, such as this research 'benefit from a switch to modern technologies; particularly when respondents are interviewed alone without the presence of other test takers such as in web-based surveys'.⁷⁶⁵

6.3.2 The Use of Online Panels

The survey was administered to a sample of online panel participants.⁷⁶⁶ For this research, the main advantage of this approach was that it facilitated access to a more demographically diverse sample than studies that use university students.⁷⁶⁷ Potential participants were also recruited more quickly and at a lower cost than if traditional methods had been used.⁷⁶⁸ In addition, this approach mitigated the issue of a low response rate, which has plagued other researchers in this area.⁷⁶⁹ However, there is no

⁷⁶¹ Peter M Nardi, *Doing Survey Research: A Guide to Quantitative Methods* (Routledge, 4th ed, 2018) 9.

⁷⁶² Sue Bennett, Karl Maton and Lisa Kervin, 'The "digital natives" Debate: A Critical Review of the Evidence' (2008) 39(5) *British Journal of Educational Technology* 775, 776.

⁷⁶³ Timo Gnamb and Kai Kaspar, 'Socially Desirable Responding in Web-based Questionnaires: A Meta-analytic Review of the Candor Hypothesis' (2017) 24(6) *Assessment* 1, 1–17.

⁷⁶⁴ Bobby Duffy et al, 'Comparing Data From Online and Face-to-Face Surveys' (2005) 47(6) *International Journal of Market Research* 615, 638.

⁷⁶⁵ Timo Gnamb and Kai Kaspar, 'Disclosure of Sensitive Behaviors Across Self-Administered Survey Modes: A Meta-Analysis' (2015) 47(4) *Behavior Research Methods* 1237, 1254.

⁷⁶⁶ Anja S Göritz, 'Using Online Panels in Psychological Research' in Adam Joinson et al (eds), *The Oxford Handbook of Internet Psychology* (Oxford University Press, 2007) 473 ('a pool of registered people who have agreed to occasionally take part in web-based studies').

⁷⁶⁷ Hilary Bambrick, Josh Fear and Richard Denniss, 'What does \$50,000 buy in a population survey? Characteristics of internet survey participants compared with a random telephone sample' (The Australia Institute, 2009) <http://www.tai.org.au/sites/default/files/TB4%20%20Phone%20and%20internet%20survey%20comparison%20final_7.pdf> 14; Richard N Landers and Tara S Behrend, 'An Inconvenient Truth: Arbitrary Distinctions Between Organizational, Mechanical Turk, and Other Convenience Samples' (2015) 8(2) *Industrial and Organizational Psychology* 142, 151.

⁷⁶⁸ Jelke Bethlehem and Silvia Biffignandi, *Handbook of Web Surveys* (Wiley, 2012) 1; Duane M Brandon et al, 'Online Instrument Delivery and Participant Recruitment Services: Emerging Opportunities for Behavioral Accounting Research' (2014) 26(1) *Behavioral Research in Accounting* 1, 3; Göritz, above n 766, 473.

⁷⁶⁹ Prichard et al, above n 2, 237; Wurtele, Simons and Moreno, above n 498, 546; Colleen M Berryessa, Jennifer A Chandler and Peter Reiner, 'Public Attitudes Toward Legally Coerced Biological

sampling frame for internet users, and very little research has explored the composition of online panels,⁷⁷⁰ or the ‘life of an online panel member’.⁷⁷¹ This introduces the potential for bias, which may affect the validity of generalising from study results.⁷⁷²

The central issue turns on the question of representativeness — are online panel members ‘typical internet user[s]’?⁷⁷³ Encouragingly, recent research shows that if carefully sampled, online panels can achieve higher levels of representation on key demographic characteristics than more traditional methods.⁷⁷⁴ As detailed below, in this research, quotas on key demographic characteristics resulted in a sample that has the desired characteristics (see, 6.4.3). Yet, as participants self-selected to take part in the research, the possibility of bias remains.⁷⁷⁵

6.4 SAMPLE

6.4.1 Selection Criteria

As foreshadowed in Chapter 1, this study sought to explore the perceptions of young adults who fit the construct of the ‘digital native’.⁷⁷⁶ This cohort represents approximately 24 per cent of the Australian population.⁷⁷⁷ Born after 1980, the term ‘digital natives’ is used to describe this cohort as this label reflects the fact that the

Treatments of Criminals’ (2016) 3(3) *Journal of Law and the Biosciences* 1, 21; Laura L King and Jennifer J Roberts, ‘The Complexity of Public Attitudes Toward Sex Crimes’ (2017) 12(1) *Victims & Offenders* 71, 78.

⁷⁷⁰ Avi Fleischer, Alan D Mead and Jialin Huang, ‘Inattentive Responding in MTurk and Other Online Samples’ (2015) 8(2) *Industrial and Organizational Psychology* 196, 196–202.

⁷⁷¹ Mario Callegaro et al, ‘A Critical Review of Studies Investigating the Quality of Data Obtained With Online Panels’ in M Callegaro et al (eds), *Online Panel Research: A Data Quality Perspective* (John Wiley & Sons, 2014) 2.12.

⁷⁷² Lynne D Roberts, ‘Opportunities and Constraints of Electronic Research’ in Rodney A Reynolds, Robert Woods and Jason D Baker (eds), *Handbook of Research on Electronic Surveys and Measurements* (Idea Group Reference, 2007) 22; Bethlehem and Biffignandi, above n 768, 2.

⁷⁷³ David de Vaus, *Surveys in Social Research* (Routledge, 6th ed, 2014) 75.

⁷⁷⁴ Miliakalea S J Heen, Joel D Lieberman and Terance D Miethe, ‘A Comparison of Different Online Sampling Approaches for Generating National Samples’ (2014) 1 *Center for Crime and Justice Policy* 1, 6.

⁷⁷⁵ Göritz, above n 766, 473.

⁷⁷⁶ Prensky, above n 178, 2.

⁷⁷⁷ Australian Bureau of Statistics, ‘Young Adults: Then and Now’ (ABS, 2013) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features40April+2013>> (Note, technically this cohort includes people aged 18–34 years).

perceptions of this cohort have been irrevocably shaped by digital technologies and, as a result, they perceive information differently from previous generations.⁷⁷⁸

This construct required that only individuals born after 1980 were sampled.⁷⁷⁹

Although the upper and lower limits could have been extended under this construct, an age range of 18 to 30 years old was sufficient for sampling purposes.

A selection criterion was also imposed on gender. While limited, previous research suggests there are differences in how males and females perceive CEM, indicating that exploring perceptions by gender has value.⁷⁸⁰ For instance, researchers have suggested that, compared to females, males may be less likely to agree with the ‘perceived harms’ of CEM,⁷⁸¹ and more likely to disagree that viewing virtual-CEM should be illegal.⁷⁸² Thus, to ensure a balanced ratio, this study imposed quotas on gender with the ratio reflecting, as close as possible, national Australian trends around gender.⁷⁸³

The use of online panels meant it was unnecessary to impose a selection criterion for internet use per se. To provide indications of digital technology immersion,⁷⁸⁴ participants were asked questions about the amount of time they spent online for personal use, whether they use adult pornography and whether they use P2P networks (see, *Appendix 2* for further details).

The latter questions were included as, further to gender, they may be identifiers of a sub-group of participants whose perceptions have particular implications for the theoretical lenses introduced earlier in this thesis. Through the lens of Chapter 3, the online behaviour of this sub-group may be a factor that puts them at increased

⁷⁷⁸ Prensky, above n 178, 2 (that is, they ‘think and process information fundamentally differently from their predecessors’).

⁷⁷⁹ Ibid 1–2.

⁷⁸⁰ See, eg, McCabe, above n 137, 74; Lam, Mitchell and Seto, above n 140, 185; Prichard et al, above n 2, 232; Hitikasch, Merdian and Hogue, above n 143, 3.

⁷⁸¹ Prichard et al, above n 2, 236.

⁷⁸² Ibid 234; Lam, Mitchell and Seto, above n 140, 189.

⁷⁸³ Australian Bureau of Statistics, ‘Population by Age and Sex, Australia, States and Territories’ (ABS, 2017)

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/3101.0Feature%20Article1Jun%202017?opendocument&tabname=Summary&prodno=3101.0&issue=Jun%202017&num=&view=>>.

⁷⁸⁴ Prensky, above n 178, 1–2.

likelihood of exposure to situational conditions that, in turn, may foster a risk of onset (see, 3.4.1). By implication, through the lens used in Chapter 4, these identifiers could be a proxy for the sub-group of the population to whom the law may affect, and therefore a group to whom the State owes a particular duty to publicise the law and give fair warning of criminalisation (see, 4.2–4.4 generally).

As a final point to note, despite outlining these implications there is no intention to imply that males who use adult pornography and/or P2P networks are at an increased risk of experiencing onset per se. Indeed, to do so would be a gross generalisation.

6.4.2 Sample Recruitment

The survey company, *Qualtrics*, recruited a proportionally representative national sample of Australian internet users from their online panels.⁷⁸⁵ The survey was administered between the 7th and 21st of February 2017. Participants were invited to complete the survey on an opt-in basis, and were advised the research involved a sensitive topic. Participants were provided with an *Information Sheet* that complied with the stipulations of informed consent (see, *Appendix 1*).⁷⁸⁶ In line with common practice among panel providers, *Qualtrics* offered participants small incentives to compensate them for their time (e.g., gift cards, charity donations and PayPal payments).⁷⁸⁷

Qualtrics sent invitations to a randomly selected cross-sectional sub-set of their pool of Australian panel members (N=1990). Of those panel members who were invited to take the survey, 938 panel members began the survey. This resulted in a response rate of 47 per cent (i.e., $938/1990 * 100$). This is comparable with other public perceptions

⁷⁸⁵ Australian Bureau of Statistics, ‘Australian Demographic Statistics, June 2017’ (ABS, 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>> (as such, the largest proportions of participants lived in New South Wales (32.9%), Victoria (25%) and Queensland (20.8%) with smaller proportions from Western Australia (11.1%), South Australia (7.3%) and Tasmania (1.2%). Very small proportions of participants lived in the Northern Territory (.8%) and the Australian Capital Territory (.8%).

⁷⁸⁶ Walter, above n 738, 131–132.

⁷⁸⁷ Email from Kyle Francis (*Qualtrics*) to Charlotte Hunn, 27 February 2017.

research in this area.⁷⁸⁸ It is also considerably higher than the eight per cent response rate in the study by Prichard and colleagues.⁷⁸⁹

Of the 938 panel members who began the survey, 357 provided partial responses and were excluded from the final dataset by *Qualtrics*. This was a conscious decision by the researcher to pay only for completed surveys due to financial constraints, and in any case, as noted elsewhere, the aims of this research are largely exploratory (see, 6.2). The researcher does not claim the sample of participants obtained is representative of the roughly 24 per cent of the Australian population that is defined as young adults.⁷⁹⁰ That said, and as has been acknowledged below (see, 6.9), it would be desirable to replicate the findings of this thesis using a representative sample of participants.

A total of 581 participants (i.e., 1990 – 357) answered all survey items. Of these, the responses of a further 77 participants were deemed to be invalid because the answers were unvarying (e.g., used the same symbol for each question) or gibberish (e.g., #f1\$3%). After removing these participants, 504 participants remained.

6.4.3 Sample Demographics

The characteristics of the sample reflect the construct of the ‘digital native’.⁷⁹¹ All participants in the sample were born after 1980 (M=25.19 years). All participants used the internet, with all but four participants reporting they used the internet ‘multiple times a day’ (87.7%), or ‘everyday’ (11.5%). On average, participants spent 5.5 hours online each day for personal use (M=5.42, SD=3.74). This is more than three times the population average,⁷⁹² and more than double the average number of hours spent online by younger cohorts.⁷⁹³ In line with general trends within representative population studies, males reported more use of adult pornography

⁷⁸⁸ King and Roberts, above n 769, 78; Berryessa, Chandler and Reiner, above n 769, 1; Daniel P Mears et al, above n 156, 540; Lam, Mitchell and Seto, above n 140.

⁷⁸⁹ Prichard et al, above n 2, 237.

⁷⁹⁰ Australian Bureau of Statistics, above n 176 (Note, technically this cohort includes people aged 18–34 years).

⁷⁹¹ Prensky, above n 178, 2.

⁷⁹² Australian Bureau of Statistics, ‘Key Findings: Households with Internet Access at Home’ (ABS, 2018) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/8146.0>>.

⁷⁹³ Ibid.

(79%) compared to females (48%), and a larger proportion of male participants reported daily and weekly use of pornography (61%) compared to female participants (15%).⁷⁹⁴

Reflecting research that individuals between 18 to 26 years old are the most likely cohorts to use P2P networks in Australia, a third of this sample reported using P2P networks.⁷⁹⁵ In addition, the sample achieved a near equal gender ratio, although the proportion of females (52%) was slightly larger than the proportion of males (48%).⁷⁹⁶

As *Figure 3* demonstrates, despite some areas of difference, this sample largely reflects the 24 per cent of the Australian population characterised as ‘young adults’.⁷⁹⁷ There was less than a five per cent difference between this sample and the young adult cohort with respect to the proportion who were in a relationship, lived in a capital city, were studying and who were unemployed.⁷⁹⁸ With respect to the possession of a tertiary qualification, the difference was less than 10 per cent⁷⁹⁹ and a 13 per cent difference for the possession of a non-tertiary qualification.⁸⁰⁰ Although the difference for employment was 18 per cent,⁸⁰¹ the definition of employment used in this survey was narrower than that used by official statistics.⁸⁰² The area of greatest difference relates to parenthood, with 25 per cent fewer participants in this sample reporting that they have children.⁸⁰³ As this sample only includes individuals up to the

⁷⁹⁴ Chris Rissel et al, ‘A Profile of Pornography Users in Australia: Findings From the Second Australian Study of Health and Relationships’ (2017) 54(2) *The Journal of Sex Research* 227, 227.

⁷⁹⁵ Australian Communications and Media Authority, ‘Digital Australians – Expectations About Mmedia Content in a Converging Media Environment: Qualitative and Quantitative’ (ACMA, 2011) <<http://www.acma.gov.au/~media/Research%20and%20Analysis/Information/pdf/Digital%20Australians%20Expectations%20about%20media%20content%20in%20a%20converging%20media%20environment.PDF>> 24.

⁷⁹⁶ Australian Bureau of Statistics, above n 781.

⁷⁹⁷ Australian Bureau of Statistics, above n 176.

⁷⁹⁸ Ibid; Trading Economics, ‘Australian Youth Unemployment Rate 1978–2018’ (Trading Economics, 2018) <<https://tradingeconomics.com/australia/youth-unemployment-rate>>.

⁷⁹⁹ Australian Bureau of Statistics, above n 176.

⁸⁰⁰ Ibid.

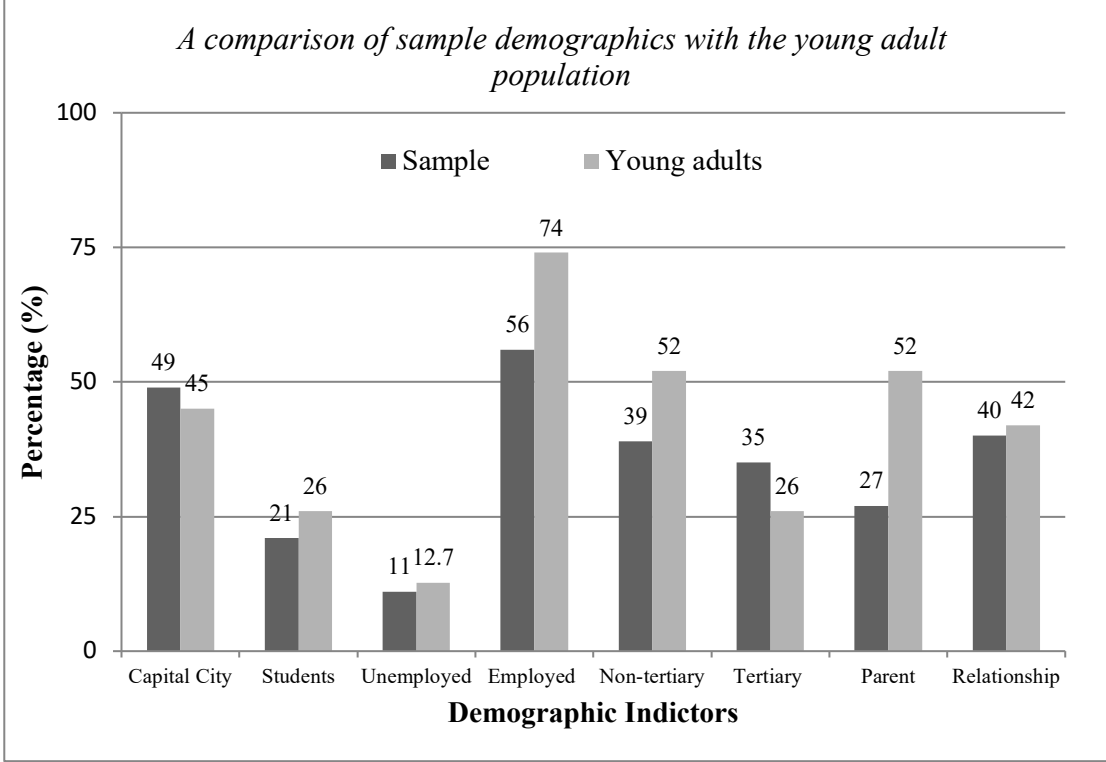
⁸⁰¹ Ibid.

⁸⁰² Australian Bureau of Statistics, ‘Labour Statistics: Concepts, Sources and Methods’ (ABS, 2006) <<http://www.abs.gov.au/Ausstats/abs@.nsf/2f762f95845417aeca25706c00834efa/47bfb611a97c91f2ca25710e007321c6!OpenDocument>>.

⁸⁰³ Australian Bureau of Statistics, above n 176.

age of 30 years, this difference is not surprising given the median age of parenthood in Australia is 31.2 years old for females and 33.3 years old for males.⁸⁰⁴

Figure 3 – A comparison of sample demographics with the young adult population



6.5 SURVEY DESIGN

6.5.1 Survey Structure

The survey instrument had four sections. Introductory questions appeared prior to substantive questions.⁸⁰⁵ The first substantive section of the survey (Section One) asked participants about the criminality of viewing a range of online material definable as CEM under Australian law. The next section (Section Two) asked participants about their awareness of the effects of viewing material involving a real child and virtual child within the Effect Categories of the *Viewer*, *Other Offenders*, *Society* and the *Child Victim* (see, Chapter 2). As foreshadowed earlier in this thesis, these categories provided a frame against which to explore public awareness, and map

⁸⁰⁴ Australian Bureau of Statistics, 'Births, Australia, 2016' (ABS, 2016) <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3301.0Main%20Features32016?opendocument&tabname=Summary&prodno=3301.0&issue=2016&num=&view=>>>.

⁸⁰⁵ Michael Ornstein, *A Companion to Survey Research* (Sage Publications, 2013) 23.

possible gaps between theorised and lay perceptions of the criminalisation of viewing material that involves a real and a virtual child (see, 2.1). The final section of the survey (Section Three) contained questions about participants' online behaviours, including their use of adult pornography and P2P networks (see, *Appendix 2 Survey Instrument*).

6.5.2 Construction of Survey Items

The construction of the survey items was informed by considerations relating to question order, the type of questions used and the use of vignettes. Within Sections One and Two 'semantic order effects' informed question order with general questions asked before specific question.⁸⁰⁶ Questions that involved the same, or a similar level, of generality, for instance those in Section One, were randomised to reduce response order distortions.⁸⁰⁷

The combination of a sensitive topic and a potentially unfamiliar topic raised the potential for the 'agree response bias', and made reliance on the agree/disagree question format inappropriate.⁸⁰⁸ Instead, mixes of closed-ended and open-ended questions were used, subject to a fixed option answer format or text box.⁸⁰⁹ In doing so, it was important to balance the strengths and weaknesses of these types of questions. While an efficient means of gathering data, over reliance on closed-ended questions risks 'correct guessing', prompting responses, and assumes that the researcher can know the range of possible responses.⁸¹⁰ On the other hand, open-ended questions enrich survey results in a way not available with closed-ended questions.⁸¹¹ They provide an opportunity to examine the full scope of the response a participant wants to give, and may thus provide a 'more reliable and valid measurement' than

⁸⁰⁶ Howard Schuman, Stanley Presser and Jacob Ludwig, 'Context Effects on Survey Responses to Questions about Abortion' (1981) 45(2) *Public Opinion Quarterly* 1, 2.

⁸⁰⁷ Mick Couper, *Designing Effective Web Surveys* (Cambridge University Press, 2008) 230.

⁸⁰⁸ Ornstein, above n 803, 28 (that is, 'tendency of survey respondents to answer positively, *regardless of a question's content*').

⁸⁰⁹ Walter, above 738, 137.

⁸¹⁰ Jon A Krosnick and Stanley Presser, 'Question and Questionnaire Design' in Peter V Marsden and James D Wright (eds), *Handbook of Survey Research* (Emerald Group Publishing, 2nd ed, 2010) 267; Ornstein, above n 803, 15 (that is, 'artificially confine the range of responses and bring to mind considerations'); Prichard et al, above n 2, 235 (identifying that the possible range of responses was unknown in their study).

⁸¹¹ Krosnick and Presser, above n 808, 266–268.

closed-ended questions.⁸¹² Yet, too many open-ended questions burden participants, which increases the risk of dropouts and/or ‘ambiguous or unintelligible answers’.⁸¹³

In recognition of these issues, the use of closed-ended questions was mainly limited to Section One, with directed open-ended questions used in Section Two. In both sections, these question types were used in conjunction with short hypothetical descriptions of behaviour or vignettes, which are commonly used to elicit data on public perceptions.⁸¹⁴

There were three main advantages to using vignettes in this study. One, vignettes invite participants to ‘make normative statements about a set of social circumstances, rather than to express ‘beliefs’ or ‘values’ in a vacuum’.⁸¹⁵ This recognises that ‘meanings are social and that morality may well be situationally specific’.⁸¹⁶ Two, the ‘story-telling nature’ of vignettes makes a survey more engaging, which increases the likelihood of survey completion.⁸¹⁷ Three, vignettes can be based on a hypothetical third person, which allows participants to distance themselves from the topic, easing ‘difficulty or embarrassment’ that may otherwise affect a response.⁸¹⁸

Section One of the survey contained nine short vignettes. In line with the prohibition on accessing CEM under federal legislation, participants were asked whether it was a crime for someone ‘to deliberately look’ at different types of materials online (see, *Appendix 2*). Three types of material were examined, including still images, moving images and text.⁸¹⁹ In doing so, participants were asked about material for both limbs of the context circumstances under the federal definition: (a) the ‘sexual activity’ or a

⁸¹² Ibid 267.

⁸¹³ Ornstein, above n 803, 16.

⁸¹⁴ Cheryl S Alexander and Henry Jay Becker, ‘The Use of Vignettes in Survey Research’ (1978) 42(1) *Public Opinion Quarterly* 93, 93; Nancy Schoenberg and Hege Ravdal, ‘Using Vignettes in Awareness and Attitudinal Research’ (2000) 3(1) *International Journal of Social Research Methodology* 63, 64; M C Angermeyer and G Schomerus, ‘State of the Art of Population-based Attitude Research on Mental Health: A Systematic Review’ (2017) 26(3) *Epidemiology and Psychiatric Sciences* 252, 252; Hanley et al, above n 184, 550 (sexual offences).

⁸¹⁵ Janet Finch, ‘The Vignette Technique in Survey Research’ (1987) 21(1) *Sociology* 105, 105–106.

⁸¹⁶ Ibid 105.

⁸¹⁷ Schoenberg and Ravdal, above n 812, 64.

⁸¹⁸ Ibid 64.

⁸¹⁹ *Criminal Code 1995* (Cth) s 473.1; See also Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004 inserting s 474.17.

‘sexual pose’ limb; and, (b) the ‘dominant characteristic’ for a ‘sexual purpose’ limb (see, 1.2.4).⁸²⁰ To reflect either end of the ‘continuum’ of whom or what is a person under this definition,⁸²¹ participants were asked about a ‘person’ described unambiguously as a ‘real child’ and a ‘cartoon child’. A further vignette described material intended to represent the oft-invoked exception to CEM – the ‘innocent family photographs of children’.⁸²²

Participants were asked to read each vignette and respond within a fixed three-option format: (1) ‘This is a crime’; (2) ‘This is not a crime’; and, (3) ‘I don’t know’. The word ‘crime’ was used as other terms (e.g., ‘not allowed’ or ‘punished’) may imply a civil response or a sentencing perspective.⁸²³

The inclusion of the ‘I don’t know’ response option recognises that a proportion of participants would be unfamiliar with this topic.⁸²⁴ It further acknowledges that, as a result, some participants would have little or no knowledge. This response option provides a means to gauge whether a participant is informed or not. It also reduces the likelihood that participants will guess, make up an answer, or drop out.⁸²⁵

Longer vignettes were used in Section Two of the survey. The two main vignettes sought to explore participants’ perceptions towards two hypothetical characters. One character was called ‘Matt’, and he deliberately accesses images of a real child being sexually abused (*Matt’s Vignette*). The other character is called ‘Josh’, and he deliberately looks at computer animations of characters that look like children performing sexual acts (*Josh’s Vignette*). Neither character pays for the material they access. In addition to these two main vignettes, a further short vignette called *Carly’s*

⁸²⁰ *Criminal Code 1995* (Cth) s 473.1 (a)–(d).

⁸²¹ *McEwen v Simmons* [2008] NSWSC 1292 [40] (Adam J).

⁸²² Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004 (Cth) 7.

⁸²³ Schuman, Presser and Ludwig, above n 804, 277 (explaining that ‘emotionally charged words’ can significantly affect responses); Ornstein, above n 803, 16–17.

⁸²⁴ Prichard et al, above n 2, 235.

⁸²⁵ Jean Philippe Pierre Decieux et al, ‘Implementation of the Forced Answering Option Within Online Surveys: Do Higher Item Response Rates Come at the Expense of Participation and Answer Quality?’ (2015) 48(4) *Psihologija* 311, 322.

Vignette was created to examine participants' awareness of the effect on the *Child Victim*.

It was important to focus attention on the behaviour itself and reduce the likelihood of bias due to the perception that characters were 'paedophiles'.⁸²⁶ To do so, the description of the behaviour of the 'Matt' and 'Josh' characters aligned with the construct of the Opportunistic Offender (see, 3.5), and the onset scenario was mundane (i.e. the characters are at home using their computers after work).

A neutral frame was used to explore participants' perceptions within each of the Effect Categories identified in Chapter 2.⁸²⁷ For example, under the Effect Category of the *Viewer*, participants were asked, '[i]f any, what kinds of effects do you think this will have on Matt?'

Framing the question in this way meant the researcher did not assume participants would identify an effect.⁸²⁸ It means that awareness of 'effects' is used as a proxy to explore participants' awareness of the explanations for criminalising CEM within each Effect Category — a potential limitation returned to later in this thesis (see, 6.9). A full description of vignettes is provided in *Appendix 2*.

Upon completion of the survey instrument, two final checks were administered. Using the *Fry Readability Graph* method, the survey was graded for 'readability'.⁸²⁹ It was well within the range recommended for the public reader.⁸³⁰ Pre-testing the survey on a small group of individuals led to minor corrections and improvements to survey content and design implemented.⁸³¹

⁸²⁶ Roland Imhoff, 'Punitive Attitudes Against Pedophiles or Persons with Sexual Interest in Children: Does the Label Matter?' (2015) 44(1) *Archives of Sexual Behaviour* 35, 37.

⁸²⁷ Paul M Sniderman and Sean M Theriault, 'The Structure of Political Argument and the Logic of Issue Framing' in Willem E Saris and Paul M Sniderman (eds), *Studies in Public Opinion: Attitudes, Nonattitudes, Measurement Error, and Change* (Princeton University Press, 2004) 143.

⁸²⁸ *Ibid* 143.

⁸²⁹ Llewellyn J Cornelius and Donna Harrington, *A Social Justice Approach to Survey Design and Analysis* (Oxford University Press, 2014) 23; Judy S Richardson, Raymond F Morgan and Charlene E Fleener, *Reading to Learning the Content Areas* (Wadsworth, Cengage Learning, 8th ed, 2012) 403 (explaining that this method grades the difficulty of text).

⁸³⁰ Neil James, *Writing at Work* (Allen & Unwin, 2007) 202.

⁸³¹ Krosnick and Presser, above n 808, 52.

The finalised survey instrument and related materials were approved by the *Tasmania Social Sciences Human Research Ethics Committee* (H0012315).

6.6 DATA ANALYSIS

6.6.1 *The Mixed Methods Approach*

The premise of a mixed methods approach to data analysis is that a blend of quantitative and qualitative methods produces a ‘better understanding of research problems than either approach individually’.⁸³² Guided by this, this study combines quantitative and qualitative ‘techniques, methods and approaches’⁸³³ to fit within the concurrent mixed-method approach. As noted above, the survey instrument explores public perceptions using both closed questions, which produce quantitative data, and open-ended questions, which, after thematic analysis, produce qualitative data.⁸³⁴ Consistent with the stipulations of the mixed-methods approach, the findings of both phases are ‘integrated’ in the latter parts of this thesis.⁸³⁵ This means the research benefits from the strengths of these approaches while also reducing the influence of the weaknesses associated with using either approach in isolation.⁸³⁶

6.6.2 *Preparing the Data*

Upon receipt of the raw data file (.cvs) from *Qualtrics*, this data was imported into the quantitative data analysis software, *SPSS Statistics*. The researcher then spent three days checking and cleaning the data, to ready it for analysis.⁸³⁷ In exploring the data, a number of categories within variables were collapsed to make results more meaningful (see, *Appendix 3* for full details).

⁸³² John W Creswell and Vicki L Plano Clark, *Designing and Conducting Mixed Methods Research* (Bibliothack, 2nd ed, 2007) 5.

⁸³³ R B Johnson and Anthony J Onwuegbuzie, ‘Mixed Methods Research: A Research Paradigm Whose Time Has Come’ (2004) 33(7) *Educational Researcher* 14, 17.

⁸³⁴ Ibid 20.

⁸³⁵ Ibid.

⁸³⁶ Ibid 14–15.

⁸³⁷ Julie Pallant, *Survival Manual: A Step By Step Guide to Data Analysis Using SPSS* (Allen and Unwin, 4th ed, 2011) 43.

6.6.3 The Quantitative Dimension

Participants' responses to the introductory questions in Section One were examined using frequency analyses, and their responses to the nine vignettes were explored. This identified areas of knowledge and where the gaps in knowledge may be. Going further, the predictive value of the gender, adult pornography use and P2P use were explored using the tests outlined below (see, 6.7). The intention in doing so was to determine whether the gaps in knowledge were common to the sample generally, or associated with those variables which, as pointed to previously, may be identifiers of a sub-group of participants whose perceptions have particular implications for the theoretical lenses introduced earlier in this thesis (see further, 6.4.1).

6.6.4 The Qualitative Dimension

Thematic analysis was used to explore participants' responses to the opened-ended questions about the effect of viewing material involving a real and a cartoon child within the Effect Categories in Section Two. Thematic analysis offers a 'useful and flexible research tool'.⁸³⁸ In conducting this analysis, responses within each of the Effect Categories were first explored inductively, that is, 'without trying to fit [the data] into a pre-existing coding frame'.⁸³⁹ This approach enabled focus on the 'experience, meanings and the reality of participants' as communicated by the participants.⁸⁴⁰ It also enabled identification, analysis and reporting of themes in the data.⁸⁴¹

To perform the thematic analysis, the data were imported into the qualitative data analysis software, *NVivo* (Version 11). Within this program, the data were analysed in line with the 6-phase 'guide' to thematic analysis, as outlined by Braun and Clarke.⁸⁴² The advantage of adopting this approach is that it provides 'clear guidelines' or a 'recipe'⁸⁴³ that sets out, in detail, how to conduct a thematic analysis in a 'deliberate and rigorous way'.⁸⁴⁴ This approach has particular value in this area, as in contrast to

⁸³⁸ Braun and Clarke, above n 737, 78.

⁸³⁹ Ibid 83.

⁸⁴⁰ Ibid 81.

⁸⁴¹ Ibid 79.

⁸⁴² Ibid 86–93.

⁸⁴³ Ibid 78.

⁸⁴⁴ Ibid 77.

other methods of analysis, it is ‘not wedded to any pre-existing theoretical framework’ and is thus more accessible as a form of analysis.⁸⁴⁵

After conducting the thematic analysis, the key themes were converted into a numeric coding scheme. This involved creating new columns in *SPSS* and manually inputting the numeric codes. A number of further analyses were conducted to explore potential patterns in participants’ responses within the data for gender, adult pornography use and P2P use, as reported below (see, 6.7.2). This was used to build up a quantitative picture of participants’ own perceptions of the effects of viewing CEM involving both a real child and a cartoon child, and identify gaps in awareness.⁸⁴⁶

6.7 RESULTS

6.7.1 Gauging Participants’ Perceptions of the Criminality of Viewing and Identifying Key Gaps in Knowledge

Under the first aim of this study, the significant finding relates to gauging participants’ knowledge of the law. As outlined earlier, participants’ knowledge was principally explored through nine vignettes that presented participants with short descriptions of material (see, *Appendix 2*). Prior to being presented with these vignettes, participants were asked to respond to a number of preliminary closed-ended questions that sought to establish participants’ familiarity with terminology, their perception of the age of a child for CEM law and whether they thought it was a crime for someone to ‘just view’ CEM online. These questions were intended to provide a very general indicator of participants’ familiarity with the existence of criminalisation in this area.

Most participants reported that they had ‘read or heard’ the term ‘child pornography’ or ‘child exploitation material’ (96.43%), and that it was a crime for someone to ‘deliberately’ look at such material online (92.3%). In line with federal law, the majority of participants thought that a person was no longer a ‘child’ under CEM law when they reached the age of 18 years old (78%). Most other participants identified the relevant age as 16 years old (16%) or 17 years old (3.4%). This is not necessarily

⁸⁴⁵ Ibid 81.

⁸⁴⁶ Ibid 82.

surprising, as these are the relevant ages under state and territory law in a number of jurisdictions.⁸⁴⁷ Thus, at the very least, these findings indicate that a majority of participants have a degree of familiarity with CEM law. Yet, as shown in *Table 4*, when asked to identify whether it is a crime for someone to view specific examples of material, levels of knowledge varied and revealed gaps.

⁸⁴⁷ In South Australia, the prescribed age is 17 years old under the *Criminal Law Consolidation Act 1935* (SA) s 62(a)(i). In Western Australia, Queensland and New South Wales, the prescribed age is 16 years old: *Criminal Code Act Compilation Act 1913* (WA) s 217A; *Criminal Code 1899* (Qld) s 207A; *Crimes Act 1900* (NSW) s 91FA.

Table 4 – Participants’ responses to the nine knowledge vignettes

Vignette No.	Vignette summary*	Within scope of definition	Participants’ responses					
			<i>It is a crime</i>		<i>It is not a crime</i>		<i>I don’t know</i>	
			(n)	(%)	(n)	(%)	(n)	(%)
<i>Vignette 1</i>	An image of a man engaged in an explicit sexual act with an 8-year-old girl	✓	479	95.04	15	2.98	10	1.98
<i>Vignette 2</i>	A cartoon image of a man engaged in an explicit sexual act with an 8-year-old girl	✓	196	38.89	156	30.95	152	30.16
<i>Vignette 3</i>	An online chat post describing a man engaging in an explicit sexual act with an 8-year-old girl	✓	271	53.77	105	20.83	128	25.4
<i>Vignette 4</i>	An image of a naked 1-year-old in a bath, such as might be found in a family photo album	✗	48	9.52	368	73.02	88	17.46
<i>Vignette 5</i>	An image taken by a 13-year-old of herself showing her naked from the waist up	✓	359	71.23	71	14.09	74	14.68
<i>Vignette 6</i>	An image of 10-year-old TV star superimposed onto the body of a naked adult man with an erection	✓	243	48.21	93	18.45	168	33.33
<i>Vignette 7</i>	An online video of naked 8-year-olds sleeping. The video focuses on their bottoms and is set to a pop song about sexual activity	✓	454	90.08	16	3.17	34	6.75
<i>Vignette 8</i>	An online video of cartoon characters that look like naked 8-year-olds sleeping. The video focuses on their bottoms and is set to a pop song about sexual activity	✓	184	36.51	133	26.39	187	37.1
<i>Vignette 9</i>	A covertly filmed video of a public change room with men and young boys getting dressed and undressed**	✓	460	91.27	22	4.37	22	4.37
<p>* See Appendix 2 for full details of all vignettes.</p> <p>** Upon review of results, the decision was made to exclude Vignette 9 from further analysis on the basis that the researcher was not able to determine whether participants were responding to the criminality of viewing such material under CEM law, or another type of crime.</p>								

Table 4 shows that the smallest gaps in knowledge were for the vignettes that, in one form or another, involved a real child. These gaps were smallest for visual-image based material showing a child in an explicit sexual image (*Vignette 1*) and a sexualised video (*Vignette 7*). Less than three per cent and four per cent of participants thought it was not a crime for someone to view such images — although almost seven per cent of participants were unsure of the criminality of viewing the sexualised image (see, *Table 4*). For *Vignette 5* and *Vignette 6* respectively, less than 15 per cent and less than 20 per cent of participants did not believe it was a crime for someone to view the image described (see, *Table 4*).⁸⁴⁸ The proportion of participants who were unsure for the latter vignette was double that of the former, as shown above.

However, more than one in five participants failed to recognise the criminality of viewing the material described in *Vignette 2*, *3* and *8*. As *Table 4* above shows, more than 20 per cent of participants did not think it was a crime for someone to read explicit sexual material about children, and a further 25 per cent of participants expressed uncertainty about the criminality of doing so (*Vignette 3*). The gaps in knowledge further expanded for cartoon material, both where it was described as explicit (*Vignette 2*) and sexualised (*Vignette 8*). Over 60 per cent of participants for each vignette either expressed a mistaken understanding of the criminality of viewing the material described, or were unsure about whether it was a crime to view such material (see, *Table 4* above).

Table 5 below presents the results of the logistic regression conducted on *Vignettes 2*, *3* and *8*, which had the largest discrepancies in knowledge, to determine whether the three key variables of gender, adult pornography use and P2P use, provide any explanation for the gaps in knowledge (see, 6.4.1). As the pattern of results across these vignettes was similar, only the results for the logistics regression for *Vignette 2* are reported in full below, to avoid repetition.

⁸⁴⁸ As an aside, the finding that more than 70 per cent of participants thought it was a crime for someone to view a self-generated image of the 13-year-old aligns with previous research: see, eg, McCabe and Johnston, above n 173, 767.

Table 5 – Summary of results of logistic regression for Vignette 2, 3 and 8

<i>Vignette</i>	<i>Variation explained by model</i>			<i>Significance of predictors</i>			<i>B values</i>			<i>Odds ratios (95% CI)</i>		
	<i>Cox & Snell R square</i>	<i>Nagelkerke R squared</i>	<i>% of cases correctly classified</i>	<i>Gender</i>	<i>Adult pornography use</i>	<i>P2P use</i>	<i>Gender</i>	<i>Adult pornography use</i>	<i>P2P use</i>	<i>Gender</i>	<i>Adult pornography use</i>	<i>P2P use</i>
<i>Vignette 2*</i>	6%	8%	61.7%	>.05	.002	.008	.073	-.774	-.626	1.08 (.68-1.70)	.46 (.29-.75)	.54 (.34-.85)
<i>Vignette 3*</i>	4%	6%	72.3%	.001	>.05	.035	-.63	-.23	-.51	.53 (.33-.87)	.80 (.48-1.32)	.56 (.37-.96)
<i>Vignette 8*</i>	5%	7%	62.2%	>.05	.051	.003	-.24	-.51	-.73	.79 (.49-1.28)	.60 (.36-1.00)	.48 (.30-.78)
* Model containing three predictors was statistically significant at or ≤ 0.001 level												

Logistic regression of participants' responses for *Vignette 2* revealed that the model comprising the three key predictors (gender, pornography use and P2P use) was highly statistically significant $\chi^2 (3, N=347) = 21.1 p = <.001$.⁸⁴⁹ As *Table 5* shows, for this vignette, adult pornography use and P2P use contributed significantly to the predictive ability of the model, and are therefore both significant factors associated with knowledge of the law for explicit cartoon material.

Table 5 shows that, although there is some variation between the three vignettes in terms of which predictors contributed significantly, adult pornography use and P2P use consistently played a role in predicting knowledge. Conversely, gender was only a significant predictor for *Vignette 3*. The negative B values for adult pornography use and P2P use for all vignettes indicates that watching adult pornography and using P2P networks was associated with a lower likelihood of correctly identifying that it is a crime to view or read these types of material; albeit that the explanatory power of these variables was weak according to social sciences guidelines.⁸⁵⁰

As shown in *Table 4* above, the results of this research reveal that for material involving a cartoon child, similar proportions of participants responded within each response category. This raised an interesting question, unconsidered at the outset of this research, namely, whether there was a consistent group of participants who held a mistaken perception of the law, or whether knowledge varied depending on the form of cartoon material, and if so, what variables, if any, were predictive of knowledge. To examine this question, the data for the two vignettes involving cartoon material (*Vignette 2* and *Vignette 8*) were combined. This revealed that proportionally 43.8 per cent of participants were unsure of the criminality of viewing explicit (*Vignette 2*) and sexualised cartoon material (*Vignette 8*), 21.6% mistakenly thought the material described in both vignettes was legal, while 29.2% correctly identified that it was a crime to view the material described in both *Vignette 2* and *Vignette 8*.⁸⁵¹

⁸⁴⁹ Note, that the model explained between 6% (Cox & Snell R Square) and 8% (Nagelkerke R squared) of the variation in knowledge, correctly classifying 61.7% of cases.

⁸⁵⁰ Christopher J Ferguson, 'An Effect Size Primer: A Guide for Clinicians and Researchers' (2009) 40(5) *Professional Psychology: Research and Practice* 532, 533.

⁸⁵¹ The remaining 5.4 per cent correctly identified that it was a crime to view the behaviour identified in either *Vignette 2* or *Vignette 8*.

6.7.2 Exploring Participants' Awareness of the Effects of Viewing and the Key Gaps in Awareness

In line with the second aim of this research, this section of the results reports on participants' awareness of explanations of the effects of viewing CEM within the Effect Categories identified earlier in this thesis (see, Chapter 2). This section begins by reporting the quantitative findings, after which the qualitative findings are reported.

6.7.3 Quantitative Findings: Participants' Awareness of the Effects of Viewing and the Key Gaps in Awareness

Participants were asked a preliminary question about whether they thought the actions of each hypothetical viewer, Matt and then Josh, 'should' be treated as a crime at the point they deliberately looked at the material for the first time. A larger proportion of participants felt viewing CEM should be treated as a crime at this point compared to the proportion that held this view about virtual-CEM (CEM (64.3%); virtual-CEM (45.8%), *McNemar Statistic* indicated this was a statistical significant difference ($N=403$, $p < .001$). The magnitude of this association, or the effect size, was small, but it was practically meaningful ($\phi = -.34$).⁸⁵² As shown in *Table 6* below, the explanatory significance of gender, adult pornography use and P2P use in predicting views about the criminality of these two types of material was similar. Accordingly, to avoid repetition, only results for material involving a real child are reported in full.

⁸⁵² Ferguson, above n 848, 533.

Table 6 – Summary of results of logistic regression for whether viewing CEM and/or virtual-CEM should be treated as a crime at onset

Material	Variation explained by model			Significance of predictors			B values			Odds ratios (95% CI)		
	Cox & Snell R square	Nagelkerke R squared	% of cases correctly classified	Gender	Adult pornography use	P2P use	Gender	Adult pornography use	P2P use	Gender	Adult pornography use	P2P use
CEM*	3%	5%	72.7%	>.05	.004	.021	-.03	-.73	-.52	.97 (.62-1.52)	.48 (.30-.79)	.60 (.38-.94)
Virtual-CEM*	4%	5%	72.7%	>.05	.031	.016	-.31	-.46	-.50	.74 (.49-1.10)	.63 (.42-.96)	.61 (.41-.91)

** Model significant at or ≤ 0.001 level*

The model containing all predictors was statistically significant $\chi^2(3, N=440) = 17.5, p = .001$, although the model has limited explanatory power.⁸⁵³ *Table 6* shows adult pornography use and P2P use were both significant predictors of whether a participant thinks the viewing of CEM should be treated as a crime. Gender was not a significant predictor. As shown in *Table 6* above, the B values were negative for both P2P use and adult pornography use. This indicates that using P2P networks and watching adult pornography is associated with a lower likelihood of endorsing the view that viewing CEM should be treated as a crime from the point of first contact. However, the explanatory power of these variables is again weak.⁸⁵⁴

As noted above, participants' awareness of the effects of viewing material involving a real and a virtual child were explored across the Effect Categories of the *Viewer*, *Other Offenders*, *Society* and the *Child Victim*. For material involving a real child, the two vignettes were *Matt's Vignette* and *Carly's Vignette*. The vignette for virtual-CEM was *Josh's Vignette*. In line with the exploratory nature of this research, and to identify gaps in awareness, the responses of participants were first examined to determine whether they thought the viewing of either type of material had 'any effect' at all within each Effect Category.

As *Table 7* below shows, for both *Matt's Vignette* and *Josh's Vignette*, most participants identified an effect within each relevant Effect Category; except for *Matt's Vignette* where the child does not know the material exists or is being viewed (the *Unknowing Child Victim*).⁸⁵⁵ Yet, as *Table 7* also shows, there were gaps in awareness within each Effect Category. A proportion of participants believed that the behaviour of the hypothetical character would have 'No effect', and a further proportion was uncertain about whether there would be any effect or not (i.e., 'I don't

⁸⁵³ Note, the model explained between 3% (Cox & Snell R Square) and 5% (Nagelkerke R squared) of the variation in knowledge. It correctly classified 72.7% of cases.

⁸⁵⁴ The odds ratios (Exp(B)) for these predictors ranged from .48 to .97 meaning they are only indicative of weak effects and their practical explanatory power is limited. See, eg, Ferguson, above n 848, 533.

⁸⁵⁵ Note, *Table 6* above shows that, in each instance, the likelihood of identifying an effect was significantly greater where the image depicted a 'real child' (*Matt's Vignette*) compared with when the image depicted a 'a computer animation of characters that look like children' (*Josh's Vignette*). That said these differences, as indicated by effect sizes, were not practically meaningful with the exception of the small, but practically meaningful difference for the *Unknowing Child Victim*: see, eg, Ferguson, above n 848, 533.

know’). Combining these responses, as in both instances participants were unaware of the possibility of an effect, offered further insight into the nature of gaps in participants’ awareness within the Effect Categories. For *Matt’s Vignette*, the gaps in awareness for the *Viewer* (5%) and the *Knowing Child Victim* (7%) were small.

In order of size, the gaps in awareness were larger for the *Unknowing Child Victim* (40%) and average for *Other Offenders* (24.5%), although there was variation by offender type (*Abuser* (31%); *Producer* (22%), and *Sharer* (21%)) and *Society* (19%). As shown in *Table 7* below, gaps in awareness were on average 11 per cent greater for *Josh’s Vignette*, with larger proportions of participants within each Effect Category unaware of any effect of viewing on the *Viewer* (18%), *Society* (35%) and *Other Offenders* (*Maker* (24%) and *Sharer* (33%)). As the key gap in awareness, the category of the *Child Victim*, when the child is unknowing, is further examined below.

Table 7 – Participants identification of effects within each Effect Category

<i>Effect Category</i>	<i>Material</i>	<i>Participants (n)</i>	<i>Effect (%)</i>	<i>No effect (%)</i>	<i>I don't know (%)</i>
<i>Viewer</i>	<i>CEM</i>	491	94.7	.4	4.9
	<i>Virtual-CEM</i>	470	81.7	7.7	10.6
<i>Abuser</i>					
	<i>Virtual-CEM</i>	305	68.9	14.8	16.4
<i>Producer/Maker</i>					
<i>Other Offenders</i>	<i>CEM</i>	430	77.7	9.3	13
	<i>Virtual-CEM</i>	458	76.4	10.9	12.7
<i>Sharers</i>					
	<i>CEM</i>	426	78.4	7.7	13.8
	<i>Virtual-CEM</i>	438	67.4	14.4	18.3
<i>Society</i>	<i>CEM</i>	452	81.4	6.4	12.2
	<i>Virtual-CEM</i>	468	65.2	17.3	17.5
<i>Child Victim</i>	<i>Knowing Child Victim</i>	504	92.9	7.1	N/A
	<i>Unknowing Child Victim</i>	503	18.7	40*	5.6

*** Note: the responses of the remaining 35.7% of participants were excluded, as they predicated or implied any effect was contingent on the child having knowledge**

Under the Effect Category of the *Child Victim*, this part explores participants' responses to the *Unknowing Child Victim* for, as reported in *Table 7*, this was the key gap in awareness. As a preliminary note, when asked about the *Unknowing Child Victim*, more than 35 per cent of participants gave a response that implied that the child had knowledge. For example, Participant 301 stated that 'She would feel upset embarrassed and objectified'. This experience presumes knowledge exists, despite the relevant vignette describing circumstances where the child victim does not have knowledge. These responses were excluded from the analysis, as they reflected a misunderstanding on the part of the participants and were not of the same quality as the 40 per cent of participants who explicitly stated there would be no effect where the child does not have knowledge (e.g., 'If she doesn't know it wouldn't have any effects' (Participant 404)).

To explore whether the key variables of gender, adult pornography use and P2P use explained any variation in participants' responses where the child victim is knowing and unknowing, a logistic regression was performed. To do so, the categories of the dependent variable 'Effect' (n=94), 'No Effect' (n=201) and 'I don't know' (n=28) were dummy coded into 'Effect identified' (n=94) and 'No effect or unsure' (n=229). This focused attention on the key area of interest, namely, whether the participants identified an effect or not.

The model summarised in *Table 8* containing all predictors was statistically significant $\chi^2 (3, N=323) = 11.2 p = .011$, although the explanatory power of the model was limited.⁸⁵⁶ While neither a participant's gender, nor their use of P2P networks, were significant predictors, whether they watched adult pornography contributed significantly to the predicative ability of the model. The positive B value for adult pornography use (e.g., .766) indicates that participants who did not report watching adult pornography were more likely to have identified that the viewer's behaviour (*Matt*) would have an effect on the *Unknowing Child Victim*. The odds ratios (Exp(B)) of 2.2 for adult pornography use indicated a practically meaningful effect size.⁸⁵⁷ This means that participants who did not report viewing adult

⁸⁵⁶ Note, the model explained between 3% (Cox & Snell R Square) and 5% (Nagelkerke R squared) of the variation in knowledge. It classified 71.1% of cases correctly.

⁸⁵⁷ Ferguson, above n 848, 533.

pornography were twice as likely to identify an effect on the *Unknowing Child*, all other factors being equal, in comparison with participants who reported that they watched adult pornography.

Table 8 –Results of logistic regression for the Unknowing Child Victim

Variables in the Equation					
Variable	B	Sig.	Exp(B)	95% C.I. for EXP(B)	
				Lower	Upper
<i>Adult pornography use</i>	.766	.004	2.152	1.273	3.638
<i>P2P use</i>	-.434	.093	.648	.391	1.075
<i>Gender</i>	.056	.833	1.057	.630	1.776
<i>Constant</i>	.573	.010	1.773		

6.7.4 Qualitative Findings: Participants' Awareness of the Effects of Viewing within the Effect Categories

Using thematic analysis, participants' own awareness of the effects of viewing CEM and virtual-CEM were explored within the Effect Categories. In reporting these findings, attention focuses on CEM involving a real child (i.e., *Matt's Vignette* and *Carly's Vignette*), with detailed findings for virtual-CEM only reported where a variation in theme or subtheme was found (i.e., *Josh's Vignette*). As such, unless otherwise noted, all examples relate to the two former vignettes. The order in which themes are reported reflects the emphasis given to them by participants and is further indicated by the use of the labels of primary, secondary and so on.

6.7.4.1 The Effects of Viewing on the Viewer

Two main themes were identified among participants' responses within the category of the *Viewer*, for both CEM and virtual-CEM. The primary theme related to the perception that viewing either type of material would have an effect on the mind of the viewer. The secondary theme related to the perception that viewing either type of material would have an effect on the behaviour of the viewer. These themes were comprised of a number of subthemes, or variations, as shown in *Table 9* and further reported below.

Table 9 – Results of thematic analysis of participants responses to the question, ‘If any, what kinds of effects does the viewing of [CEM or virtual-CEM] have on the viewer?’

Theme	Subtheme	Definition
Primary: Fosters negative attitudes towards children	<i>Normalises and desensitises</i>	Viewing normalises the behaviour shown in the mind of the viewer
	<i>Altered perspective on children</i>	Viewing alters a viewer’s perspective of children
Secondary: Incites child sexual abuse	<i>Offending risk</i>	Viewing fosters an offending risk for other types of offences against children
	<i>Other concerns</i>	Viewing leads to behaviour becoming increasingly serious/problematic

(a) Fosters Negative Attitudes Towards Children

Normalises: Participants perceived normalisation to take two distinct forms. First, that viewing would normalise the viewing behaviour itself. For instance, Participant 96 observed that where the material involves a real child, ‘[i]t might normalise this behaviour to him and make it seem more acceptable’.

The second form was that viewing would normalise the behaviour shown in the image. An example of this theme comes from Participant 62 who felt, as a result of viewing material involving a real child the viewer ‘may begin to think this kind of behaviour is appropriate given he has viewed many videos of different adults abusing children’.

Desensitises: Expressing a similar sentiment, participants felt that, through exposure to these types of material, the viewer would become desensitised to the content leading the viewer to distance themselves from the effect of their behaviour.

Describing this, Participant 350 stated that viewing would ‘desensitise Matt to the harm he is causing by looking at this’. Further elaborating on this idea, Participant 353 explained how Matt would:

start [to] believe that there is nothing wrong about what he is viewing or that it is different to the adult pornography he once watched. The fact that he is watching illicit material that has contributed to the abuse of a child is most likely now lost on him.

Altered perspective on children: The likelihood of a viewer developing a sexualised perspective of children featured prominently among responses. A number of participants described how this would occur. For example, Participant 428 stated that

‘Matt may begin to see young children as sexual objects and as people he can have relations with. His attitude towards young children may change’.

Some participants raised the possibility that a viewer would begin indulging in sexual fantasies about real children. Participant 105 described how ‘Matt is likely to be fantasising about sexual act[s] with children’.

A serious concern for a number of participants was the idea that viewing material involving a real child could precipitate, or prompt, a sexual interest in children. Some participants went as far as suggesting an individual could become a paedophile from viewing such material. For instance, Participant 21 felt viewing this material would ‘[t]urn [Matt] into a paedophile’.

(b) Incites Child Sexual Abuse

Offending risk: Some participants made comments along the lines that ‘Matt would be compelled towards performing the same type of sexual activity with a minor’ (Participant 174), while other participants were equivocal about the nature of this risk. This was evident in the range of qualifying terms that participants used. These included ‘may’ (Participant 4), ‘might’ (Participant 78), ‘could’ (Participant 177) and even ‘could possibly’ (Participant 225) become an abuser. Going further, a small proportion of participants pointed to the possibility that viewing CEM ‘satisfies such cravings so as to prevent an actual act’ (Participant 439).

A further offending risk identified was the potential for viewing to lead the viewer to commit other types of CEM offences. The most common concern was the likelihood that viewers would produce their own material. For instance, Participant 382 stated, ‘Matt may want to act out these photos in real life by finding children and taking photos of them naked’.

Other participants identified the possibility a viewer would become a participant in the material. For example, Participant 15, commented that Matt could ‘become a participant in these photos or films’, while Participant 125 felt Matt would ‘arrang[e] to abuse children himself with one of these people’. A further small number of participants identified that viewing ‘might sway [Matt] towards illegal practices such as sharing or possession of child pornography’ (Participant 499).

Other concerns: This subtheme related to concern that continual viewing by the characters of Matt and Josh would lead to their behaviour becoming increasingly serious. Participants identified two primary concerns (a) the viewer would begin looking at more extreme material; and, (b) that the viewer would become addicted to CEM.

Under the former, participants described how Matt's behaviour would lead him to 'progressively look at worse stuff' (Participant 132), or 'more hardcore forms of it' (Participant 219). Characterising this process, Participant 125 reported that continued viewing 'would drive him further and further into more effed up stuff to get the same effect'. Turning to the latter, participants pointed to the possibility that the viewer would develop an addiction to, or obsession with, CEM. For instance, acknowledging this possibility for Matt, Participant 501 referred to Matt as 'addicted to child pornography', while Participant 88, presumably drawing on their beliefs about adult pornography, stated that '[i]t doesn't matter what kind of pornography, after watching it once you find yourself searching again'.

(c) An Area of Variation for Virtual-CEM

Although the above two subthemes were identified by participants within *Josh's Vignette*, a more common concern was that someone who views virtual-CEM would transition to view CEM involving a real child. For instance, Participant 38 felt that viewing virtual-CEM 'could easily lead to looking at actual child pornography'. For Participant 149, it was inevitable that the viewer would 'start looking for real child porno'. There was a degree of equivocation evident about the nature of this risk, with participants using qualifying terms to modify their response (e.g., 'might' (Participant 127), 'likely' (Participant 117) and 'probably' (Participant 163)). Even so, a number of participants felt that little more than curiosity and opportunity could prompt such a transition. For instance, Participant 291 reported 'he might get curious about real child pornography', and Participant 215 stated that a viewer '[m]ay continue on until one day clicking onto non-animated clips of this nature'.

The two other concerns identified by participants, that a viewer may begin looking at more extreme material and become addicted, were also raised for virtual-CEM, although the tone of responses varied. For example, under the former, some participants focused on the possibility that the viewer would 'go deeper into these

sites which will lead to something more sinister’ (Participant 246), while others were more concerned about the possibility of the viewer viewing ‘more realistic’ material (Participant 344). A conflicting opinion was also expressed. Participant 496 stated, ‘I think he might be getting more intreseted [sic] in these animations but won’t go much further’. Under the latter, while the likelihood of addiction was acknowledged, it appears that lower levels of knowledge about the criminality of this behaviour affected responses. For example, Participant 404 characterised Josh’s behaviour as ‘[a]n unhealthy addiction that may not be illegal but is morally troubling’.

6.7.4.2 *The Effects of Viewing on Other Offenders*

Thematic analysis revealed that participants’ responses for the effects of viewing on *Other Offenders* were largely similar for CEM and virtual-CEM. For *Producers*, *Makers*, and *Sharers*, two themes were evident, namely, *Perpetuation of Risk* and the *Market and related concepts*. Each theme consisted of a number of subthemes, as shown in *Table 10* below.

Table 10 — Results of thematic analysis of participants’ responses to the question; ‘If any, what kinds of effects does the viewing of [CEM and virtual-CEM] have on the Other Offenders?’

Theme	Subtheme	Definition
Primary: <i>Perpetuation of Risk</i>	<i>Fosters an offending risk</i>	The viewer creates an offending risk for <i>Other Offenders</i>
	<i>Escalates offending</i>	The viewer precipitates an escalation in the behaviour of <i>Other Offenders</i>
	<i>Endorses offending</i>	The viewer causes <i>Other Offenders</i> to feel validated and justifies their actions
Secondary: The market and related concepts	<i>The Market</i>	The viewer creates/contributes to a market
	<i>Related concepts</i>	The viewer creates an audience and the perception that the material is popular

(a) Perpetuation of Risk

Fostering offending risk: This subtheme captures responses by participants that the viewing of CEM and virtual-CEM fosters an offending risk for *Other Offenders*. As this offending risk took two main forms for both types of material, only those responses relating to CEM are detailed here. The two forms were: a direct causative link and a form of encouragement. Offering an example of the former, Participant 174

explained that because of the behaviour of the viewer, those who abuse children ‘will engage in abusive activities on children more’. In contrast, and providing an example of the latter, Participant 400 characterised Matt’s behaviour as ‘an act of encouragement to take even more photos of child pornography’.

As an aside, and as this example shows, it was not clear from participants’ responses how likely they regarded the possibility that other offenders would act on such encouragement.

Escalates offending: A further subtheme turned on the idea that the behaviour of the viewer could escalate the behaviour of the *Other Offender*. For example, Participant 17 pointed to the possibility of a viewer’s behaviour encouraging an *Abuser* to ‘abduct children for their purpose’. Although issues around the escalation of behaviour were not raised for *Producers*, they were raised for *Sharers*. Here, concern centred on the idea the viewer’s behaviour would lead *Sharers* to ‘create’ (Participant 348) or ‘make’ (Participant 223) CEM themselves.

Endorses offending: The final subtheme took the form of concern that the behaviour of the viewer may have a positive emotional effect on *Other Offenders*. For instance, participants emphasised the viewer’s behaviour gives an *Abuser* ‘validation’ (Participant 13), together with the feeling their behaviour is ‘justified’ (Participant 444). Other participants felt the behaviour of the viewer would lead other offenders to feel ‘empowered’ (Participant 163), and even ‘happy someone is looking at their photos’ (Participant 176). Similar sentiments were expressed about the emotional effect of the viewer’s behaviour on *Producers* and *Sharers*.

Some participants expressed an alternative view whereby the behaviour of the viewer would precipitate a negative emotion for the other offender. Using the example of the *Abuser*, a number of terms were used including that this offender would feel ‘[e]mbarrassment’ (Participant 318), ‘stress’ (Participant 482) or, as Participant 94 stated, ‘guilty’.

(b) The Market and Related Concepts

The market: This subtheme refers to the perception that the behaviour of a viewer contributes to a market, the existence of which has an effect on *Other Offenders*. With

respect to *Abusers*, participants made comments along the lines that ‘[t]he viewing of the images is creating a market for the product’ (Participant 277). Similar comments were made for *Producers* and *Sharers*. For example, Participant 335 stated the behaviour of the viewer ‘tells the film makers people want to see this, there is a market for it’ while Participant 304 described how the viewing of material ‘provides [sharers] with a market’. Other participants used the terms supply and demand to explain the effect of viewing on *Other Offenders*. Participants’ responses under *Abuser* indicate a general understanding of these terms. For instance, ‘viewership leads to demand and the abusers would meet the demand’ (Participant 13), and such offenders ‘may want to make more of those kinds of photos as they think there is demand’ (Participant 187).

These terms were also used to explain the effect of viewing on those who produce and those who share CEM. For *Producers*, Participant 399 stated ‘Matt again will further fuel the industry, cause more demand, etc’. Similarly, participants focused on how Matt’s behaviour would lead *Sharers* to ‘think their content is in demand’ (Participant 390). Describing the effect of this, Participant 230 stated that ‘it would create more of a demand for this content so more people would share what they have to get more’.

Related Concepts: Some participants used related concepts to describe the effect of viewing CEM on *Other Offenders*, including ‘audience’ and analogously ‘popularity’. For instance, participants reported *Abusers* would continue to abuse children ‘because they’re getting an audience’ (Participant 12). Similarly, participants felt the behaviour of the viewer would, respectively, lead *Producers* to ‘take more [images] for their audience’ (Participant 218), and cause *Sharers* to ‘share more since the link is popular and they will get the attention they desire’ (Participant 492).

(c) Conditions of Effect

Under these subthemes, participants identified two dependent conditions that affected the likelihood that a viewer’s behaviour would have an effect on *Other Offenders*, namely, knowledge and payment. Under the former, participants explained that whether or not the other offender had knowledge of a viewer’s behaviour was critical. For example, Participant 285 explained that any effect on a *Producer* ‘would be dependent on whether these people know of the reach and interaction with the materials’. Under the latter, participants identified that payment played an important

role. For example, Participant 504 identified that a *Sharer* would share more CEM ‘[i]f they are receiving an economic incentive through website advertising’. Adding further insight, when asked directly, most participants indicated that they thought any effect on *Other Offenders* would be greater if ‘Matt’ or ‘Josh’ paid to access the material.⁸⁵⁸

(d) An Area of Variation for Virtual-CEM

Under the former theme, *Perpetuation of Risk*, an area of variation for virtual-CEM, took the form of concern that the behaviour of the viewer ‘might’ lead *Makers* to ‘make more lewd or excessive animations’ (Participant 473). However, again, the main concern was the prospect of transition. The idea that *Other Offenders* would transition from making or sharing cartoon material to producing and sharing material involving real children. For example, Participant 267 stated that *Makers* could ‘take things a step further and upload live footage’, while Participant 355 explained that *Sharers* could ‘branch into the real thing’.

6.7.4.3 The Effects of Viewing on Society

Thematic analysis of participants responses within the Effect Category of *Society*, revealed two primary themes: *Risks to Society* and *Damage to Society*. For each theme, a number of subthemes were identified, as shown in *Table 11*.

⁸⁵⁸ For *Matt’s Vignette* (84.5%) and *Josh’s Vignette* (77.8%).

Table 11 — Results of thematic analysis of participants’ responses to the question; ‘If any, what kinds of effects does the viewing of [CEM and virtual-CEM] have on Society?’

Theme	Subtheme	Definition
Primary: Risks to society	<i>Risk to children</i>	Viewing creates a general risk to children in society
	<i>Risk of normalisation</i>	Viewing normalises such behaviour within society
	<i>Prevalence of material as a risk</i>	Viewing increases the prevalence and accessibility of material within society
Secondary: Damages society	<i>Erosion of trust</i>	Viewing erodes trust within society
	<i>Degradation of social values and morals</i>	Viewing degrades values and morals within society
	<i>Elevates social anxiety</i>	Viewing increases anxiety within society

(a) Risks to Society

Risk to children: This subtheme refers to the perception that the presence of individuals within society who view CEM presents a general risk to children. Participants made comments along the lines that the viewer’s behaviour ‘[m]akes our world less safe for children’ (Participant 286). Participants also pointed to a more localised threat to children. For example, Participant 274 explained that it was ‘very possible [a viewer] could impact his community by actually conducting his own sexual crime with a child’.

Risk of normalisation: This subtheme refers to the perception that the presence of individuals within society who view CEM normalises such behaviour. Participants focused on the broader societal implications of a viewer’s behaviour. For example, Participant 151 identified that the actions of a viewer ‘normalises the behaviour if everyday people like Matt look at it’. Commenting further, Participant 219 stated that the perception that ‘others are doing it too’ would contribute to ‘an increasingly lenient view on child pornography’. For Participant 80, this would have the practical effect of making it ‘harder to recognise who in society is taking part because it could be anyone’.

Prevalence of material as a risk: Participants pointed to issues around the amount, accessibility and the permanency of CEM because of the behaviour of a viewer. According to participants, a key implication for society was that the viewer’s

behaviour would exacerbate the general problem of CEM by increasing the amount of material in circulation. For example, Participant 390 explained that Matt's behaviour meant there would be '[m]ore child porn' in circulation. Other participants stressed issues around the accessibility and the permanency of CEM once uploaded to the internet. For instance, Participant 155 worried about the '[i]ncrease[d] accessibility to these photos' as a result of the viewer's behaviour. In turn, Participant 503 expressed concern that viewing would play a role in '[p]erpetuating the longevity of child pornography'.

(b) Damages Society

Erosion of trust: Participants expressed the belief that the behaviour of the viewer would erode trust within society, and the trust of male members of society in particular. Providing an example of the former, Participant 336 observed that the behaviour of a viewer would lead to '[m]ore people not trusting others because people can be creeps'. Meanwhile, indicating the latter, Participant 356 explained that the behaviour of a viewer 'paint[s] adult men as horny individuals who are a threat to children. Men won't be trusted and all men around children will be eyed suspiciously'.

Degradation of social values and morals: This subtheme refers to the perception that viewing material involving a real child '[d]egrades society' (Participant 268), 'downgrades societies morals and standards' (Participant 203) and ultimately, as Participant 297 stated, leads to the 'decay of [the] moral fabric' of society.

Elevates social anxiety: Participants further felt Matt's behaviour would make people within society more anxious, particularly parents. Participant 15 explained how knowledge that people like 'Matt' are viewing CEM 'makes parents more in fear'. Expressing a similar sentiment, Participant 412 identified that '[t]here will always be fear for parents and community about potential dangers'. Other participants felt that the effect of the viewer's behaviour would be that society generally would 'become more worried about possible paedophiles within their community' (Participant 183) and 'sexual deviants' (Participants 160).

6.7.4.4 The Effects of Viewing on the Child Victim

As foreshadowed above, responses within the Effect Category of the *Child Victim* were divided between two circumstances: (a) where the child is described as having no knowledge (the *Unknowning Child Victim*) and (b) where the child is described as having knowledge that the image exists and is being viewed (the *Knowing Child Victim*).

6.7.4.5 The Unknowning Child Victim

Thematic analysis identified two main themes in this category, *Risks for the Child* and *Intrinsic Harms to the child*. Each theme consisted of two subthemes, as shown in Table 12.

Table 12 — Results of thematic analysis of participants’ responses to the question; ‘If any, what kinds of effects does the viewing of an image of a real child have on the Unknowning Child Victim?’

Theme	Subtheme	Definition
Primary: Risks for the Unknowning Child Victim	Risk of recognition	Viewing fosters the risk that the child will be recognised
	Risk of predation and re-victimisation	Viewing fosters the risk of predation and re-victimisation
Secondary: Intrinsic Harms to the Unknowning Child Victim	Inherently abusive and exploitative	Viewing is inherently abusive and exploitative of the child shown
	Contravenes rights of the child	Viewing contravenes the rights of the child shown

(a) Risks for the Unknowning Child Victim

The risk of recognition: This subtheme refers to the perception that the behaviour of those who view CEM increases the risk the child shown in the image will be recognised. Participants referred to the risk of recognition by ‘someone’ (Participant 370), by ‘[p]eople [the child] knows’ (Participant 422), more generally by ‘people like Matt’ (Participant 315) and by the viewer (e.g., ‘Matt will recognise her’ (Participant 277)). For some participants, it was recognition itself that was the issue. For example, Participant 457 felt that the child would be ‘wondering why people are staring at her when she is out in public’. Yet, for other participants, issues that followed from recognition were the focus. According to participants, such issues included public ‘ridicule’ (Participant 62), that people would ‘look down and judge her’ (Participant 189) and that people would ‘slander her name’ (Participant 158). A further concern in

this context was that recognition would negatively affect the child's 'prospect[s] of getting a job' (Participant 136).

The risk of predation and re-victimisation: This subtheme refers to the perception the behaviour of the viewer puts the child shown in the material at risk of predation and of re-victimisation. Notwithstanding some overlap with the former subtheme, participants under this subtheme focused on the likelihood that the child would become a 'target' (Participant 76), be harassed by 'others and strangers' (Participant 436) and be 'more susceptible to paedophiles' (Participant 435). Emphasising the risk posed by the viewer, and others, Participant 420 stated:

I think it could potentially put her in danger if Matt saw her in person, or decided to act on these impulses with her now no matter her age. Not to mention all the other creeps who saw them.

Some participants felt that people who saw the image would 'try to locate [the child]' (Participant 117) which, for some participants, was a perpetual risk. Expressing this, Participant 23 stated that viewers 'could prey on her even as an adult and she wouldn't know. She wouldn't even see it coming'. This risk was also characterised as the possibility 'someone could become obsessed with [the child] from looking at the photo and stalk and hurt her' (Participant 10).

(b) Intrinsic harms to the Unknowing Child Victim

Inherently abusive and exploitative: This subtheme relates to the perception the viewing of CEM is inherently harmful to the *Unknowing Child Victim*. Participants described how the behaviour of the viewer was 'still degrading' (Participant 77), 'still abuse' (Participant 56), and still exploitation because, as Participant 196 put it, 'even if she doesn't know she is still being exploited'. Capturing this sentiment, Participant 13 characterised the behaviour of the viewer as 'dehumanising and abusive in its own right', while Participant 263 stated that '[the child] is still a victim — [viewing] re-perpetuates the original crime'.

Contravenes the rights of the child: Some participants used the concepts of rights to explain the effect of the viewer's behaviour on the *Unknowing Child Victim*. Participants invoked both a general concept of rights (e.g., the child's 'human rights' (Participant 60)), and the right to privacy specifically. With respect to the latter,

participants characterised the viewer's behaviour as a contravention of the child's right to privacy describing how the viewer was '[i]nvading [the child's] privacy' (Participants 149), and viewing was an '[i]nfringement of Carly's privacy' (Participants 310).

6.7.4.6 The Knowing Child Victim

Thematic analysis revealed three main themes about why participants thought that the effect of the viewer's behaviour was 'different or greater' on the *Knowing Child Victim*. These included: (a) *Emotional damage*; (b) *Psychological damage*; and, (c) *Social damage*. As shown in Table 13, these themes covered a number of subthemes.

Table 13 – Results of thematic analysis of participants' responses to the question; if any, what kinds of effects does the viewing of an image of a real child have on the Knowing Child Victim?

Theme	Subtheme	Definition
Primary: Emotional damage	Shame, violation and degradation	Viewing causes the child to feel shame, violation and degradation
	Powerlessness	Viewing causes the child to feel powerless
	Fear and worry	Viewing causes the child to feel fear and worry
Secondary: Psychological damage	Mental health issues	Viewing causes the mental health of the child to deteriorate
	Damages prospects of recovery	Viewing damages the child's prospects of recovery
Tertiary: Social damage	Support for abuse	Viewing communicates to the child that there is support for her abuse

(a) Emotional damage

Shame, violation and degradation: Participants identified the child would feel a range of emotions extending from forms of shame, to violation and feelings of degradation. Indicating the former, Participant 12 suggested that the child 'may feel embarrassed that people are seeing the picture', with Participant 49 describing how Carly's 'shame will be amplified' in circumstances where 'she knows other people can view it'. Among participants who perceived the experience of the child as more one of violation, Participant 499 stated that 'she not only has to deal with the demons of her abuse, but now also the knowledge that she is still exposed to the entire world due to the reach of the Internet'.

A number of further participants used the term ‘degraded’ to describe how the child would feel. For instance, Participant 150 felt that ‘[s]he would know people are feeding off her misfortunes and therefore feel degraded’.

Powerlessness: Some participants felt that the child would experience feelings of powerlessness because ‘she can’t do anything about it’ (Participant 182) — ‘it’ being the viewer viewing the image online. Indeed, making this point, Participant 241 likened knowledge to ‘adding salt to the wound’, explaining that, ‘it’s even more devastating to not be able to do anything about it. Once it’s online, it’s there forever. What’s seen, cannot be unseen’.

Providing a counterpoint, some participants felt knowledge gave the child power, with three forms of power identified. One, the child could remove the images (e.g., ‘she would be able to delete it’ (Participant 429)). Two, the child could get help to remove the image (e.g., ‘[i]f she knew it was online she could have it taken down sooner’ (Participant 19)). And three, the child could pursue legal action (i.e., ‘take action against the people who viewed and downloaded her images’ (Participant 23)).

Fear and worry: Participants also identified that the child would experience fear and worry. For instance, Participant 210 suggested that the child ‘would be in constant fear of who was seeing that photo’. Other participants, including Participant 426, described how ‘[the child] would always worry someone she knows would see it’.

(b) Psychological damage

Mental health issues: This subtheme relates to the perception viewing CEM has an adverse effect on the child’s mental health. Participants identified a number of mental health issues, including ‘anxiety’ (Participant 219) and ‘depression’ (Participant 149). With respect to the latter, Participant 267 took this further, describing how the child could ‘spiral into deeper depression, potentially becoming a threat to herself’. Other participants put this risk more explicitly still. Participant 470 reported that the child ‘may become extremely depressed and possibly commit suicide’, while Participant 17 characterised the child’s mental state as ‘suicidal’.

Damaging prospects of recovery: This subtheme refers to the perception that viewing damages the prospects of a child’s recovery from the original abuse. Participant 28

described how finding out that the images were ‘online for a whole bunch of people to see [this] is going to restart that whole process of fixing herself’. Other participants thought such knowledge would prevent the child from recovering as it meant ‘[the child] doesn’t get to move on’ (Participant 370).

(c) Social damage

Support for abuse: This theme relates to the perception that if the child knows an image is online and people are viewing it, this damages the child’s relationship with society. Explaining this effect, Participant 39 stated that the behaviour of the viewer ‘tells [the child] that people are interested in and supporting the behaviour that hurt her’. Put another way, Participant 133 stated that knowledge would demonstrate to the child that people are ‘supporting what happened against her’.

6.8 DISCUSSION

This discussion explores the findings of this study with reference to the previous empirical research on public perceptions of CEM (Chapter 1), and for the qualitative results, against the Effect Categories as reviewed in Chapter 2. This discussion serves to contextualise this research within its proper context. It also lays the groundwork for the forthcoming discussion in Chapter 7. In the next chapter, the findings and discussion of this chapter are applied to the findings and discussion of this chapter.

6.8.1 Participants’ Knowledge of the Law and Key Gaps in Knowledge

In line with the first aim of this research, this study built on, and went beyond the existing research into public knowledge of the law (see, 1.4.3). Using a sample of 504 participants, it began by posing preliminary questions relating to the general operation of CEM law in Australia. The study found participants had a general level of familiarity with the existence and basic parameters of criminalisation in this area. Most participants reported familiarity with the terms ‘child pornography’ and ‘child exploitation material’, recognised that it was a crime to ‘just view’ such material online, and thought a ‘child’ was someone under the age of 18 years old under this law (see, 6.7.1).

These findings tend to reflect the research examined earlier in this thesis (see, 1.4.3). Yet, even at this general level, 31 participants did not think it was a crime to ‘just

view' CEM online, and a further eight participants expressed uncertainty about whether it was a crime or not. Put another way, almost eight per cent of participants in this study held a general misconception about this area of law. This proportion is slightly larger than the one in 20 participants who reported a lack of knowledge in the study by Prichard and colleagues.⁸⁵⁹ This may be because this study captures those who thought they knew the law, but were mistaken — a cohort not captured by the previous study — although sample and question difference provides a more likely explanation of the variance.

As foreshadowed above, analysis of participants' responses to the nine knowledge-based vignettes revealed a more nuanced picture of participants' knowledge. Using these vignettes, this study showed that knowledge varied within the scope of material definable as CEM under Australian law (see, 1.2.4). While previous Australian research has not directly examined levels of knowledge, this study confirms the suggestion that there is a lack of knowledge,⁸⁶⁰ or, as Liddell and Taylor put it, that there is a 'disjuncture' between public perceptions of what CEM is, and what the law says it is.⁸⁶¹ For CEM that involves a real child, one in 20 participants did not think it was a crime to view an explicit image (*Vignette 1*), and one in 10 participants did not think it was a crime to view a sexualised video (*Vignette 7*).

These numbers are small, and fewer participants in this sample were uncertain about the criminality of viewing CEM than in the study by Lam and colleagues.⁸⁶² Even so, the observation by Lam and colleagues, that there is 'confusion about the legality of viewing child pornography online', still resonates.⁸⁶³ Another indicator of this confusion in this context was that a quarter of participants were unsure, and to a lesser extent, mistaken, about whether it was a crime to look at a family photo of a child in a bath (*Vignette 4*).

⁸⁵⁹ Jeremy Prichard et al, above n 2, 235.

⁸⁶⁰ Ibid 235.

⁸⁶¹ Liddell and Taylor, above n 2, 43.

⁸⁶² Lam, Mitchell and Seto, above n 140, 185 (finding that 44.8% of participants were unsure about the illegality of viewing CEM involving a real child and 7% thought it was legal).

⁸⁶³ Ibid 188.

As noted previously, such material is unlikely to fall within definitions of CEM (see, 1.2.3). It is possible that the context in which this question appeared played a role. In this sense, it could be evidence of the kind of perverse effect of criminalisation identified by Adler; that is, in considering this otherwise innocent image, participants may have taken on the ‘gaze of the paedophile’, and in doing so determined that the image harboured a ‘secret paedophile appeal’.⁸⁶⁴

The key gaps in knowledge, as indicated by the fact that more than one in five participants wrongly identified that the behaviour was legal, appeared for text-based and virtual-CEM. The finding that roughly four in 10 participants were mistaken or unsure about whether it was a crime to read explicit written CEM (*Vignette 3*) resonates with the finding of Hitikasch, Merdian and Hogue.⁸⁶⁵ Combining the responses for the two vignettes involving explicit and sexualised cartoon images revealed that more than 20 per cent of participants mistakenly thought it was legal to view explicit (*Vignette 2*) and sexualised cartoon material (*Vignette 8*), and a further 40 per cent were unsure. This suggests a pervasive level of uncertainty for this type of material.

Examining these areas in further detail revealed that adult pornography use and P2P use were often weak, or alternatively, not practically meaningful predictors of knowledge, with gender only predictive for *Vignette 3*. The confidence levels around the effect sizes of these variables were large. This casts some doubt over results, and means it is not possible to draw confident conclusions about the relative importance of these predictors from this data. Results from the multiple regression analysis followed a similar pattern. Although the effect size was not practically meaningful, being male, watching adult pornography more often and using P2P networks more frequently, were variables that were predictive of a lower likelihood of a participant identifying the correct response. While the variation in results suggests it would be premature to rule these variables out entirely, the data suggest that the gaps in knowledge are common to the sample generally, rather than limited to a specific cohort who is male, watches adult pornography and uses P2P networks.

⁸⁶⁴ Adler, above n 277, 213.

⁸⁶⁵ Hitikasch, Merdian and Hogue, above n 143, 5.

6.8.2 Participants' Awareness of the Effects of Viewing and Key Gaps in Awareness

In line with the second aim of this research, this study explored participants' own awareness of the effects of viewing CEM on the *Viewer*, *Other Offenders*, *Society* and the *Child Victim*. As noted above, two vignettes were used to explore perceptions of CEM (*Matt's Vignette*), and virtual-CEM (*Josh's Vignette*), with the former supplemented by *Carly's Vignette*. The results of this study indicate that while participants were aware of a broad range of possible effects from viewing CEM and virtual-CEM, there were gaps in awareness.

Before turning to discuss the findings, it is apropos to point out that the legitimacy of using awareness of effects as a proxy through which to infer that a participant perceived an effect as explaining criminalisation is questionable. A participant might have identified an effect that they think neither explains nor justifies criminalisation, but is nonetheless an effect. This possibility is admitted, although its likelihood is somewhat tempered as the effects identified by participants within each Effect Category largely correspond to the literature (see, Chapter 2). Thus, even accepting the former possibility, it would still be accurate to conclude that — at a minimum — participants in this sample were aware of the types of explanations given in the literature that justify the criminalisation of viewing CEM (see, Chapter 2).

The starting point for this discussion is to recognise that participants in this study identified at least one effect within each Effect Category (see, 6.7.3). On its face, this finding suggests a potentially wide-ranging awareness of the effects of viewing CEM and virtual-CEM among participants. The only exception to this was the Effect Category of the *Child Victim*, where the child was described as unknowing (the *Unknowing Child Victim*). In drawing attention to this result, further comment is necessary. The perception that a viewer's behaviour has no effect on the *Unknowing Child Victim* appears to be relatively common. Yet, because participants were not asked how often they thought a child was likely to be unknowing, there is an unknown implicit in this finding.

This study found that participants were most likely to identify an effect on the *Viewer* (see, 6.7.3). This reflects the dominant policy justification for criminalisation,

discussed in Chapter 2 (see, 2.2).⁸⁶⁶ In terms of a possible gap in awareness for CEM, only one in 20 participants were uncertain, or denied an effect on the *Viewer*, whereas for virtual-CEM this proportion increased to one in five participants (see, 6.7.3). This means that for both types of material, a majority of participants identified that viewing would have an effect on the *Viewer* (see, 6.7.3). The primary theme among participants' responses was that viewing would foster negative attitudes towards children in the mind of the *Viewer* (see, 6.7.4.4).

It may be that some participants intended to imply that an effect on the mind would affect behaviour; however, this was not explicitly stated nor reflected in the subthemes. On the latter point, although participants referred to processes through which a viewer's inhibitions around offending might be lowered (e.g., through processes of normalisation and desensitisation), and that their perspective on children may be altered, they did not go as far as suggesting this would result in contact offending (see, 6.7.4.1(a)-(b)).

In a similar vein, while Prichard and colleagues found variations in the levels of agreement for statements about the effects of viewing CEM on the viewer,⁸⁶⁷ they found that levels of agreement were generally high for statements about the kinds of beliefs which viewing CEM may generate. For example, 88 per cent of participants agreed that viewing CEM 'encourages adults to view children as sexual objects', and 83 per cent of participants agreed that CEM encourages a belief that it is acceptable 'to engage in sexual activity with children'.⁸⁶⁸

To that end, the findings of both these studies are somewhat at odds with the literature wherein the risk that viewing will have an effect on the behaviour of the viewer, rather than just their mind, receives primary emphasis (see, 2.2). This suggests that even though theorists recognise that the criminal law cannot criminalise thoughts —

⁸⁶⁶ Gillespie, above n 188, 230.

⁸⁶⁷ Prichard et al, above n 2, 230 (eg, 'Child pornography encourages adult to sexually abuse children' (Agree (75.2%) Cf Disagree (24.9%); 'Child pornography makes adults more sexually attracted to children and less sexually interested in adults' (Agree (53.3%) Cf Disagree (46.6%)).

⁸⁶⁸ Ibid 230.

even sexual thoughts about children — this effect came readily to the minds of participants in this study.⁸⁶⁹

The secondary theme under this Effect Category was the perception that viewing might incite child sexual abuse (see, 6.7.4.1 (b)). This reflects previous research that levels of agreement with statements about behaviour (e.g., '[c]hild pornography encourages adults to sexually abuse children') were lower than those relating to beliefs.⁸⁷⁰ This possibility receives primary emphasis in the literature (see, 2.2) but, like theorists, participants did not characterise this possibility as straightforward. Participants used qualifying terms (e.g., 'may' and 'might'), and recognised that viewing CEM might have a therapeutic value (e.g., viewing may 'satisfy[s] cravings so as to prevent an actual act' (Participant 439)).⁸⁷¹ Beyond explanations for criminalising the viewing of CEM per se, participants expressed others concerns, including that viewing may lead a viewer to view increasingly extreme material and result in an addiction to such material.

In the literature, the possibility that CEM might be used to groom a child receives much attention (see, 2.2.3). In this study, not a single participant referred to grooming, perhaps suggesting a gap in awareness. Yet, equally, it may be that participants perceived the behaviour associated with grooming as distinct from the act of viewing CEM, because such behaviour requires a further degree of control to be exercised over the material (see, 2.2.3).

Turning to virtual-CEM, while a smaller proportion of participants identified an effect in this category, the effects identified were the same as those for CEM, except for the possibility that a viewer of virtual-CEM could transition to viewing CEM involving a real child. In describing this possibility, participants perceived little more than curiosity and opportunity as likely triggers (see, 6.7.4.1(c)). While this possibility is largely dismissed in the literature,⁸⁷² recent empirical research suggests that some types of virtual-CEM may play a role in facilitating onset for CEM (see, 3.4.1).

⁸⁶⁹ Danay, above n 205, 189.

⁸⁷⁰ Prichard et al, above n 2, 230.

⁸⁷¹ Taylor and Quayle, above n 207, 90; Cf Gillespie, above n 50, 41; Seto, above n 208, 68.

⁸⁷² Gillespie, above n 50, 111.

More than 90 per cent of participants in this study identified an effect on the *Knowing Child Victim* (see, 6.7.3). In the study by Prichard and colleagues, similar proportions of participants agreed that child victims would be ‘further traumatised’ by the fact that people might be sexually aroused by their images and that their images were circulating implying knowledge on the part of the child.⁸⁷³

In this study, participants identified three main themes, or types of effect: (a) *Emotional damage*, (b) *Psychological damage* and, (c) *Social damage* (see, 6.7.4.6 generally). Under the first theme, while participants identified a number of emotions, the dominant subtheme took the form of references to feelings of shame, degradation and violation, raising an interesting question. That is, in using these terms, did participants intend to imply that the knowledge of others of the abuse suffered by the child exacerbates their victimisation? If this was the intended implication, this may suggest a perception that Hessick has argued plays a role in fostering ‘a culture of secrecy that allows child sexual abuse to continue undetected’.⁸⁷⁴ While reference to the potential for the child to feel powerless sidesteps such concern to a degree, participants were somewhat naive about the likelihood that an image could be removed and that power could be restored to the child, given how images proliferate online.

The range of possible psychological effects, however, demonstrates sensitivity to issues associated with mental health, recovery from child sexual abuse and the potential for serious effects on the child into the future (e.g., ‘[the child] doesn’t get to move on’ (Participant 370)). As a final point, recognition that a child might interpret the knowledge that others are viewing their image as an expression of societal support for the abuse perpetrated against them, ties into the argument that criminalisation is a way to express the non-tolerance of all forms of child sexual abuse (see, 2.4.1).

Indicating a gap in awareness, less than a fifth of participants perceived that viewing material could have an effect on the *Unknowing Child Victim*, that is, a child who

⁸⁷³ Prichard et al, above n 2, 230 (eg, ‘Child pornography further traumatised victims who are upset by the fact that others may be sexually aroused by watching their abusive experience’ (Agreeing (95.4%); ‘Child pornography further traumatises victims who are upset by the fact that records of their abuse are being circulated’ (Agreeing (96.8%)).

⁸⁷⁴ Hessick, above n 221, 870.

does not know the image exists and is being viewed online (see, 6.7.3). Previous research has not directly examined perceptions towards the *Unknowing Child Victim*, although when knowledge was not implied, levels of agreement drop slightly compared with statements that implied knowledge.⁸⁷⁵ The above analysis also reveals that participants who do not report watching adult pornography were twice as likely to identify an effect on the *Unknowing Child Victim* (see, 6.7.3). Of these participants, the two prominent themes were *Risks for the Unknowing Child Victim* and *Intrinsic Harms to the Unknowing Child Victim*.

Under the primary theme *Risks for the Unknowing Child* (see, 6.7.4.5 (a)), the main subtheme was that viewing fosters a risk that the child will be recognised (*Risk of recognition*); a risk characterised as external to the child. Participants identified a number of types of risks, including ridicule and adverse implications for the child's career prospects. The second subtheme was the *Risk of predation and re-victimisation*. While there is some overlap between these two subthemes, in that the latter subtheme assumes recognition, the focus of this theme was on the adverse consequences of recognition for predation and further victimisation. Both subthemes characterised the viewer's behaviour as a form of ongoing exploitation and abuse, in the sense that the potential for the child to experience an effect exists even when the child does not have knowledge per se. These subthemes are indicative of the kinds of effects that are characterised in the literature as continuing, or 'secondary harms' under *Condition 2* (see, 2.5.1).⁸⁷⁶

The secondary theme, *Intrinsic Harms to the Unknowing Child Victim* (see, 6.7.4.5 (b)), was also comprised of two subthemes. The primary subtheme was that viewing was an act that was inherently abusive and exploitative of the child involved, while the secondary subtheme was that the act of viewing was a contravention of the rights of the child. Under the former subtheme, participants described how the behaviour of the viewer was, irrespective of whether the child knew, a form of degradation, abuse and exploitation (see, 2.5.1). These sentiments correspond to the statement by Ost,

⁸⁷⁵ Prichard et al, above n 2, 230 (eg, 'Whatever harms might occur in the production of child pornography, no further harm is perpetrated just from viewing the material' (Agreeing (89.8%) Disagreeing (10.3%)). Cf 'Child pornography further traumatises victims who are upset by the fact that records of their abuse are being circulated' (Agreeing (96.8%) Disagreeing (3.3%)).

⁸⁷⁶ Gillespie, above n 50, 43.

that the harm of possessing CEM turns on the fact that by ‘possessing’ the image the viewer is ‘taking unfair advantage of [the child] and using [the child] as a means to an end’.⁸⁷⁷ While not suggesting that participants were aware of concepts such as under-writing⁸⁷⁸ that underlie this explanation, reference to the notion that exploitation exists in this context reflects the tenor of such explanation.

Only a handful of participants referred specifically to rights based concepts under the secondary theme (*Contravenes rights of the child*). Participants almost exclusively characterised the relevant right, as a right to privacy. This form of right suggests the view of Martin, that the act of viewing is itself a ‘renewed violation of the privacy of the children in the images’.⁸⁷⁹ It also reflects Harduf’s conceptualisation of the ‘intrinsic’ dimension of privacy, whereby the act of possession (and arguably the act of accessing) is the ‘violation’.⁸⁸⁰ The other dimension of this conceptualisation sees this act as part of a process that facilitates the distribution of the material until it reaches the child’s social group, at which point, the ‘violation’ of the child’s privacy occurs.⁸⁸¹ This latter dimension has similarity with the type of recognition risk identified above (see, 6.7.4.5 (a)), although according to Harduf, this type of ‘violation’ requires the child’s knowledge, or the knowledge of someone the child knows.⁸⁸²

In reflecting on why so few participants raise rights in this study, it may be that the term ‘effect’ was too tangible a concept to prompt participants to think of rights. For instance, asking participants ‘do you think the viewing of CEM contravenes the rights of the child shown in the material?’ may have elicited a different level of response. Yet, combining all references for the *Unknowing Child Victim* shows that less than one in five participants identified any effect (see, 6.7.2). If nothing else, this suggests that rights did not come readily to the mind of most participants in this study. Although, and as noted above, since participants were not asked how often they thought a child was likely to be unknowing, there is an unknown implicit in this

⁸⁷⁷ Ost, above n 232, 119.

⁸⁷⁸ Ibid 118.

⁸⁷⁹ Martin, above n 336, 279.

⁸⁸⁰ Harduf above n 190, 301.

⁸⁸¹ Ibid 301.

⁸⁸² Ibid 295.

finding. In addition, participants were not asked why they thought viewing would not have an effect on the *Unknowing Child Victim*. Given that the vast majority of participants identified an effect on the *Knowing Child Victim*, there is a strong inference that knowledge is the critical factor.

Over 80 per cent of participants in this study identified that the behaviour of the viewer would have an effect on *Society* (see, 6.7.3). While the themes identified among participants' responses under the Effect Category do not line up neatly with the literature, there is a degree of symmetry among the subthemes. For example, the primary theme (*Risks to Society*) consists of three subthemes that, broadly speaking, relate to how criminalising viewing reduces risk and therefore protects children within society (see, 2.4.1).

This suggests a degree of alignment with the precautionary approach advocated in the literature.⁸⁸³ With respect to previous research, it tends to reflect the levels of agreement found for statements about the threat that CEM poses to children.⁸⁸⁴ There are also areas of commonality between the references under the secondary theme (*Damages Society*) and feminist arguments (see, 2.4.1). For instance, marrying with Roos' argument that viewing CEM is 'an overt attempt' to destroy the barrier society has constructed between children and sex, participants described how viewing CEM damages social relationships.⁸⁸⁵ Linking into Ost's concern that CEM communicates 'representations of children as exploitable sexual objects',⁸⁸⁶ a number of participants emphasised an erosion of trust around male members of society (see, 6.7.4.3(b)). Although it is true that the characters in this study were male, which may have influenced this result, the reality is viewers of CEM are generally male (see, 3.4.3).

Approximately one in four participants did not think the behaviour of the viewer would have any effect on *Other Offenders* in this study, although there was some variation between types of offender (see, 6.7.3). Yet, unlike in the literature, the

⁸⁸³ Taylor and Quayle, above n 207, 195.

⁸⁸⁴ Prichard et al, above n 2, 230 (eg, '[c]hild pornography threatens the innocence of children' (Agreeing (93.8%) Disagreeing (6.2%)).

⁸⁸⁵ Roos, above n 244, 149.

⁸⁸⁶ Ost, above n 219, 454 (although see 3.4.2. about the varying motivations for CEM offending).

market was not referred to as ‘the most reasonable’ explanation.⁸⁸⁷ The primary theme to emerge from participants’ responses was *Perpetuation of Risk*, that is, the potential for the behaviour of the viewer to create and foster a risk that an *Abuser*, *Producer* and/or *Sharer*, will commit a further crime.

While this theme may reflect a lay understanding of the market dynamic, at the same time, it may indicate that market terminology does not resonate with this sample. This would account for why fewer participants used market terms, and why there were fewer references generally under the theme, *Market and Related Concepts*.

Nonetheless, the references made under these two themes indicate that participants in this study recognised there could be a relationship between the actions of a viewer and the actions of other offenders — although whether this relationship gave rise to a risk, or something more tangible, was less clear. On this latter point, it is perhaps revealing that Prichard and colleagues found that less than six per cent of participants disagreed with the statement that viewing CEM ‘encourages producers to create more images and videos’.⁸⁸⁸

In contrast, this study found that more than three times as many participants were unaware that the behaviour of the viewer could have an effect on a producer (see, 6.7.3). While it would be rash to ascribe too much weight to this difference, as it is not a direct comparison, it reinforces the observation of Liddell and Taylor that there exists a perception gap with respect to how the actions of perpetrators of child sexual abuse are affected by those who view such material.⁸⁸⁹

Going further, theorists are divided on the question of the condition by which a market dynamic is triggered (see, 2.3.1). In brief, the narrow view sees only a monetary transaction (i.e., payment) as the relevant condition, while the broad view includes other types of conditions including behaviour validation, provided the other offender has knowledge that the material is being viewed.⁸⁹⁰ In this study, a proportion of participants identified knowledge and payment under *Market and Related Concepts*

⁸⁸⁷ Danay, above n 205, 191.

⁸⁸⁸ Prichard et al, above n 2, 230 (‘[v]iewing child pornography encourages producers to create more images and videos depicting children being sexually abused’ (Agreeing (94.2%); Disagreeing (5.8%)).

⁸⁸⁹ Liddell and Taylor, above n 2, 43.

⁸⁹⁰ See, eg, Ost, above n 232, 113; Jenkins, above n 10, 91; Taylor and Quayle, above n 207, 132.

(see, 6.7.4.2(c)). Most participants focused on the issue of knowledge, perhaps suggesting a preference for the broad view. Alternatively, it could merely indicate that participants have not considered the nature of demand, and the conditions under which supply may be triggered, in sufficient detail to recognise the limitations of this type of explanation. As a final point, most participants recognised that payment increased the likelihood of an effect on *Other Offenders* (see, 6.7.4.2(c)).

As noted above, under the Effect Category of *Other Offenders*, participants referred to the same effects for virtual-CEM, with one exception. Participants perceived that the viewing of virtual-CEM would create or contribute to a risk that *Other Offenders* would transition to CEM. This possibility is not raised in the literature, where instead, the viewing of virtual-CEM is perceived as opening a conduit to support the market for CEM (see, 2.3.2). While the format of these questions may have influenced the overlap in the types of effects identified for virtual-CEM, it may also suggest that a proportion of participants believe that the effects of viewing in this context are similar, irrespective of the type of material viewed. It is not possible to infer from this that participants think such behaviour should be criminalised; it merely indicates that participants identify that this is an effect of viewing.

As a final point for discussion, this study found that 24 per cent of participants did not think that the behaviour of a viewer, in deliberately choosing to view CEM for the first time, should be ‘treated as a crime’ (see, 6.7.3). An additional 11.7 per cent of participants did not think such behaviour should be ‘treated as a crime’, unless a further condition was present (e.g., ‘Only if he continues to look at the image and gets sexually aroused by it’ (Participant 263)). This proportion increased to 54.2 per cent for virtual-CEM (see, 6.7.3).

While Prichard and colleagues asked participants a more general question about whether it should be illegal to look at CEM, they found that only seven per cent of participants disagreed.⁸⁹¹ Even allowing for the possibility that the term ‘illegal’ and ‘treated as a crime’ could be perceived differently, this difference suggests that perceptions vary depending on an individual’s involvement with the material. This

⁸⁹¹ Prichard et al, above n 2, 228 (‘To what extent do you agree or disagree that it should be illegal to look at online child pornography involving real children?’).

conclusion coincides with the finding of Crookes and colleagues, that is, that how involved an ‘offender’ was perceived to be influenced participants’ perceptions of how serious the act of the offender was.⁸⁹²

A similar difference was evident with respect to what Prichard and colleagues called ‘pseudo’ material, defined as material not involving a real child.⁸⁹³ This study found that being male was weakly predictive of a lower likelihood of thinking the viewing of CEM and virtual-CEM should be treated as a crime at the point of onset (see, 6.7.3). However, overall, this study provides limited support for previous research suggesting that, in comparison to females, males may be more likely to ‘construct CEM as a victimless, private sexual pursuit’,⁸⁹⁴ and that males are ‘less opposed to the idea of viewing images of children as long as no real children are depicted’.⁸⁹⁵

6.9 LIMITATIONS

As outlined above, practical steps were taken to minimise issues known to reduce reliability and validity within the survey design (see, 6.5 generally). Even so, there are a number of general limitations to the findings of this research.

This study only captures point in time perceptions. This means that caution is advisable in interpreting these findings, as in all probability, knowledge and awareness will shift and change within the community. The composition of this sample compares favourably to the young adult population of Australia and the construct of the digital native (see, 6.4.3). Yet this necessarily means the study may not capture the views of other parts of the community.

Further, with respect to sampling, the sensitive nature of the research topic may have affected results. For example, at the recruitment stage, some potential participants might have chosen not to complete the survey because of the topic, and this would introduce self-selection bias.⁸⁹⁶

⁸⁹² Crookes, Merdian and Hassett, above n 468, 175.

⁸⁹³ Prichard et al, above n 2, 229.

⁸⁹⁴ Ibid 236.

⁸⁹⁵ Lam, Mitchell and Seto, above n 140, 191.

⁸⁹⁶ Kevin B Wright, ‘Researching Internet-Based Populations: Advantages and Disadvantages of Online Survey Research, Online Questionnaires Authoring Software Packages, and Web Survey

Even though the response rate was consistent with other studies in this area, and a marked improvement on the response rate achieved by Prichard and colleagues, the representativeness of the sample may be affected.⁸⁹⁷ This inhibits the potential for the results to be generalised and population parameters to be estimated.⁸⁹⁸ The chosen research method also assumes a false degree of homogeneity between this sample and the wider population.⁸⁹⁹

This study only explored knowledge and awareness of a limited range of material under the federal definition of CEM (see, *Appendix 2*). This approach means other types of material were not captured. No comparison was made with other types of criminal offences. Thus, while this study reveals that there are gaps in knowledge and awareness for the online viewing of these types of material, it cannot be claimed that such gaps are unique to this offence.

6.10 CONCLUSION

The design of this study aligned with the purpose of this research. The methods chosen enabled data analysis that supported the research aims. The careful design of the survey instrument, and the choice of online panels, meant that the researcher could reach, and obtain rich data from, the cohort of interest. The results revealed that most participants knew it was a crime to view material involving a real child.

Yet, there were key gaps in knowledge around the types of material and content definable as CEM under Australian law, beyond explicit and sexualised visual imagery of naked children. Further, although many of the participants in this study were aware of a range of effects from viewing CEM and virtual-CEM, gaps in awareness were evident. These appeared to cluster around the effect of viewing material on *Other Offenders*, *Society*, and particularly, the *Unknowing Child Victim*. While the variables of gender, adult pornography use and P2P use, accounted for

Services' (2005) 10(3) *Journal of Computer-Mediated Communication*
doi.org/10.1111/j.10836101.2005.tb0025 9.x

⁸⁹⁷ Louis M Rea and Richard A Parker, *Designing and Conducting Survey Research: A Comprehensive Guide* (Jossey-Bass, 4th ed, 2014) 196.

⁸⁹⁸ Wright, above n 894, doi.org/10.1111/j.10836101.2005.tb0025 9.x

⁸⁹⁹ Gelb, above n 174, 8.

some gaps, overall, they were weak predictors, with the exception of adult pornography use, for the *Unknowing Child Victim*.

Tentatively, the results of this study suggest such gaps may be common generally among the perceptions of internet users who fit the construct of the digital native, rather than a specific sub-set of this cohort who are male, watch adult pornography and use P2P networks. The wide confidence intervals indicate it would be premature to give too much weight to this suggestion without further research.

Nonetheless, this chapter has yielded original understandings about public perceptions in the Australian context. Significantly, it has revealed where levels of knowledge and areas of awareness appear to be well developed, and it has identified gaps in knowledge and awareness. In doing so, it contributes most directly to the Australian research context, wherein it expands and refines the limited evidence base in this area (see, 1.4 generally).

That said, this exploration may have wider implications for scholars who are seeking to explore public perceptions towards this area of law outside Australia. It underlines the value in taking an exploratory approach. With respect to knowledge, this study emphasises the relevance of gauging knowledge of the law; an area glossed over previously (see, 1.4.3). And, in finding that there are gaps in awareness about the effect of viewing, even for material that involves a real child, this study flags the possibility of a more general issue with public perceptions. These possibilities warrant further consideration, given the potential implications for the prevention of onset, as considered through the theoretical lenses introduced in Chapter 3 and Chapter 4.

The broader implications of the findings of this chapter are now explored in the final chapter of this thesis, Chapter 7.

CHAPTER 7: CONCLUSION AND DISCUSSION OF THE KEY LESSONS FROM FINDINGS ABOUT PUBLIC PERCEPTIONS FOR THE PREVENTION OF ONSET

7.1 INTRODUCTION

This thesis has argued that the current policy settings of the Australian government have failed to heed public perceptions, and what they may reveal about how to prevent ‘onset’, that is, the first instance of ‘deliberate viewing’ of CEM online.⁹⁰⁰ Building on nascent Australian research that pointed to the possibility of a ‘clear disjuncture between some social attitudes and the law’,⁹⁰¹ this thesis went beyond existing research. Although limited to examining the perceptions of a sub-set of the Australian public, this study gauged knowledge of the scope of criminalisation for the viewing of CEM and explored awareness of the effects of viewing on the *Viewer*, *Other Offenders*, *Society* and the *Child Victim* among this cohort.

While this study found that participants were, in general, reasonably knowledgeable about the criminality of viewing CEM that involves a real child, sizable proportions of participants held mistaken beliefs about the criminality of viewing virtual-CEM, including explicit and sexualised cartoon material and explicit written material (see, 6.7.1). Turning to awareness of the effects of viewing, while less than 10 per cent of participants were unaware that the viewing of CEM involving a real child could have an effect on the *Viewer* or the *Knowing Child Victim*, roughly one in five participants were unaware of any effect on *Other Offenders* and *Society* in general. In addition, 40 per cent of participants denied that there would be any effect on the child victim, if the child did not know the image existed and was being viewed (see, 6.7.2). For virtual-CEM, the gaps in awareness were 11 per cent greater on average (see, 6.7.2).

To reflect on the implications of these findings, this concluding chapter takes a fresh look at the theoretical arguments that undergird this thesis. In doing so, the focus is on the implications for Australia, as the empirical research into public perceptions takes place within the Australian policy and legislative context.

⁹⁰⁰ Prichard, Watters and Spiranovic, above n 3, 587.

⁹⁰¹ Prichard et al, above n 2, 234.

First, the implications for the argument made in Chapter 3 are explored to answer the question: *What Do Public Perceptions Reveal about Preventing the Opportunistic Offender from Onset?*

Next, attention turns to examine the implications of findings for the legal theory arguments made in Chapter 4. This examination is framed by the question, *What Do Public Perceptions Reveal about the Duty on the State to Publicise the Law and Give Fair Warning of Criminalisation?* In doing so, this chapter identifies the issues with public perceptions, as revealed by the application of these lenses. This thesis did not seek to investigate how the issues identified through these lenses might be remedied per se. Yet, in the interests of completeness, the penultimate part of this chapter takes the lessons learnt from the application of findings to theory, to propose key recommendations for improvement. These recommendations intersect public policy, legislation and judicial practice.

The final part of this chapter draws this thesis to its conclusion, identifying important areas for future research, and reiterating the original and substantive contribution this thesis makes.

7.2 LESSONS FOR PREVENTION – FINDINGS TO THEORY

7.2.1 What Do Public Perceptions Reveal about Preventing the Opportunistic Offender from Onset?

It was contended in Chapter 3 that the current policy architecture in Australia evinced a policy blind spot (see, 3.3), conceptualised as the Second Aim of primary prevention.⁹⁰² While judges' sentencing remarks were identified as a possible exception to this contention, the study undertaken in Chapter 5 found that even if such remarks slightly reduced the size of this blind spot, the value of such remarks was greatly affected by three limitations (see, 5.5.3). In other words, the study in Chapter 5 emphasised the policy blind spot. This brings attention back to the three arguments identified in Chapter 3, that underline the argument for addressing the Second Aim of primary prevention; the questions of 'how' offending begins, 'why' offending occurs and 'who' offenders are (see, 3.4 generally).

⁹⁰² Wortley and Smallbone, above n 50, 89.

To further this argument, the lens of SCP was used to show how a potentially valuable opportunity to prevent offending was being overlooked; that is, preventing the Opportunistic Offender from onset. In making this argument, the final part of Chapter 3 married the vulnerabilities of the Opportunistic Offender, namely, ambiguity about the criminality of behaviour⁹⁰³ and a lack of moral clarity,⁹⁰⁴ with research about public perceptions. In doing so, the chapter drew attention to the possibility that public perceptions may provide an indicator of the need to switch the ‘moral scruples’ switch to ‘on’.⁹⁰⁵ This current chapter now re-examines this possibility to determine whether the gaps uncovered in digital natives’ knowledge and awareness (see, Chapter 6) should raise concern.

The starting point for this discussion is that the Opportunistic Offender is vulnerable to ambiguity about the criminality of behaviour.⁹⁰⁶ As reported in Chapter 6, the key gaps in knowledge relate to the viewing of explicit and sexualised cartoons involving representations of children, and the reading of explicit stories about children (see, 6.7.1). As such, findings suggest that, far from being perceived as ‘strictly criminal’,⁹⁰⁷ for significant proportions of participants, the act of viewing and reading such material is ‘ambiguously criminal’.⁹⁰⁸

In making this point, it is not suggested that participants — or digital natives more generally — who do not think that viewing or reading such material is a crime, are vulnerable to offending per se. Rather, emphasising these gaps in knowledge draws attention to areas of ambiguity that may represent soft spots in the prevention armoury for an Opportunistic Offender (see, 3.5). In other words, because the Opportunistic Offender is vulnerable to a lack of clear rules,⁹⁰⁹ these gaps in knowledge may affect

⁹⁰³ Cornish and Clarke, above n 507, 62.

⁹⁰⁴ Ibid 67.

⁹⁰⁵ Ibid 80.

⁹⁰⁶ Ibid 62.

⁹⁰⁷ Ibid.

⁹⁰⁸ Ibid.

⁹⁰⁹ Ibid 62, 64.

how ‘qualified’⁹¹⁰ the offending readiness of such an offender is likely to be, subject to the other situational factors and opportunity (see, 3.5).⁹¹¹

Yet, even beyond these areas, these gaps in knowledge, and the soft spots they represent, may have implications for other types of material, including material that involves real children. Nascent research indicates written material may be a stepping-stone, or pathway, to onset for material involving a real child (see, 3.4.1). Admittedly, this research is limited. Available evidence suggests that the use of adult pornography, and perhaps the use of P2P networks, are more common antecedents to the first deliberate viewing of CEM involving a real child (see, 3.4.1). There is also no research to suggest that viewing virtual-CEM poses a similar risk, even if offenders are often found to have such material.⁹¹² That said, it may be that ambiguity about the criminality of viewing virtual-CEM is particularly relevant to younger cohorts, for whom cartoons and animations in general hold attraction.⁹¹³

Turning to gaps in awareness for the effects of viewing CEM, the starting point for this discussion is that the Opportunistic Offender is vulnerable to a lack of moral clarity.⁹¹⁴ To offend, an Opportunistic Offender must find a way to liberate himself (or herself) from ‘moral scruples’.⁹¹⁵ The absence of such scruples is conceptualised as the presence of ‘excuses’ and/or ‘permissions’ that enable an individual to perform an otherwise proscribed act by weakening their internal inhibitions against such behaviour.⁹¹⁶

Of relevance to this, Chapter 6 found that while less than 10 per cent of participants were unaware that the viewing of CEM could have an effect on the *Viewer* or the

⁹¹⁰ Ibid 67.

⁹¹¹ Admittedly, there is a lack of evidence about how prevalent virtual-CEM is online, or to that end, written CEM. This means it is not possible to indicate with any certainty how likely such an opportunity in fact is. That said, evidence about the availability and accessibility of CEM online generally (see, 1.4.3) coupled with the observation by Mains that there has been an ‘explosion’ in the amount of virtual-CEM created in the United States hints at this likelihood. See Mains, above n 263, 827.

⁹¹² Warner, above n 93, 388 (observing out that it is not unusual for offenders to be found with virtual material intermingled with material depicting real children).

⁹¹³ McLelland, above n 333, 234.

⁹¹⁴ Cornish and Clarke, above n 507, 67.

⁹¹⁵ Ibid 62.

⁹¹⁶ Wortley, above n 504, 65.

Knowing Child Victim, approximately one in five participants were unaware of any effect on *Other Offenders* and *Society*, and two fifths of participants denied that there would be any effect on the *Unknowing Child Victim* (see, 6.7.2). Gaps in awareness increased a further 11 per cent on average for virtual-CEM, meaning this discussion, with the exception of points made about the *Child Victim*, also apply to such material (see, 6.7.2).

As contended in Chapter 3, an indication of how easy — or otherwise — it is for internal inhibitions to be weakened for the type of behaviour discussed here, may be signalled by gaps in awareness about why such behaviour is criminal — particularly if such gaps were evident for the wider community. This is because an Opportunistic Offender exists in a state of ‘qualified readiness’;⁹¹⁷ a state in which an individual is ‘continually sensitive’ to the presence or absence of situational cues that indicate whether behaviour is excusable or permissible.⁹¹⁸ The research examined earlier suggests a range of perceptions, or ‘cognitive distortions’, may be associated with CEM offending (see, 3.6.2). Accepting the contention of Merdian and Bartels, that for CEM offending such beliefs are likely to ‘occur at every stage of the offending process’ including reducing inhibitions around onset,⁹¹⁹ the gaps in awareness uncovered by this study raise concern. The gaps in awareness, and their potential meaning are now discussed.

The largest gap in awareness related to the possibility that the behaviour of a viewer could have an effect on the *Unknowing Child Victim* (see, 6.7.3). As discussed, this gap represents a significant departure from the literature (see, 6.8.2). On this point, perhaps the most interesting finding was that among those participants who did identify an effect in these circumstances, only a handful used a rights-based concept (see, 6.7.4.5(b)). That said, there are a number of possible interpretations.

For one, it is possible that the lack of awareness among participants in this study could merely denote a general unfamiliarity with rights-based concepts. While it is beyond the scope of this thesis to examine this area in detail, such a finding is not necessarily surprising. As Tobin points out, Australian governments have failed to use

⁹¹⁷ Cornish and Clarke, above n 507, 67.

⁹¹⁸ Ibid.

⁹¹⁹ Bartels and Merdian, above n 479, 17.

rights instruments, particularly the *CRC*, to advance the ‘notion of children as rights bearers’, even within the confines of these instruments.⁹²⁰

Nor is the idea of children as rights bearers accepted without debate.⁹²¹ Adding further weight to this argument, the study undertaken in Chapter 5 reveals that none of the normative messages identified by judges to explain why an offender’s behaviour is morally wrongful, turn on the notion that a child has rights (see, Chapter 5). As such, the infrequency of rights-based thinking among participants may simply be a foreseeable consequence of the dearth of rights-based education in Australia, from school onwards.⁹²²

Further, while theorists refer to a number of specific rights, such ‘rights’ do not necessary translate into tangible legal entitlements, or have such expression under Australian law, as, with some exceptions, Australia does not have domestic rights based instruments.⁹²³ However, Australia is party to the *CRC* and has ratified the *Optional Protocol to the Convention of the Rights of the Child on the sale of children, child prostitution and child pornography 2000* (the ‘*Optional Protocol*’).⁹²⁴ The *Protocol* was developed in response to concern that the *CRC* did not provide sufficient detail about the requirements on State Parties to protect children.⁹²⁵

Admittedly, neither instrument bestows rights of the type envisioned in the literature, or to that end, the right to privacy identified by participants in this study (see, 6.7.4.5(b)). Yet, Article 9.1 of the *Optional Protocol* provides, among other things, that parties shall ‘implement and disseminate ... social policies and programmes to prevent the offences [in the *Optional Protocol*]’.⁹²⁶ In other words, the child has a

⁹²⁰ John Tobin, ‘The Development of Children’s Rights’ in Geoff Monahan and Lisa Young (eds), *Children and the Law in Australia* (LexisNexis, 2008) 23.

⁹²¹ Michael Freeman, ‘Why It Remains Important to Take Children’s Rights Seriously’ (2007) 15(1) *International Journal of Children’s Rights* 5, 5–6.

⁹²² Nina Burridge, John Buchanan and Andrew Chodkiewicz, ‘Human Rights and History Education: An Australian Study’ (2014) 39(3) *Australian Journal of Teacher Education* 18, 33.

⁹²³ See, eg, *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

⁹²⁴ *Optional Protocol on the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 16 March 2001, A/RES/54/263 (entered into force 18 January 2002). Note that the *Optional Protocol* only applies to real children art. 2(c)).

⁹²⁵ *Optional Protocol* art 9.

⁹²⁶ *Ibid* art 9.2.

right to be protected, which arguably, should encompass the kinds of ‘rights’ referenced in both the literature (see, 2.5.1 (c)) and in this study (see, 6.7.4.5(b)).

Returning to the findings of this study, if participants — not to mention digital natives more generally — do not recognise that exploitation and abuse *exists* when the child is unknowing, it is hardly surprising that they make little, if any, reference to rights. Put another way, if a person does not think there is any effect on a child where the child is unknowing, then he or she will not perceive viewing to be a form of abuse or exploitation from which the child should be protected.

This raises an additional issue. Does this gap in awareness suggest a lack of familiarity with rights based concepts that, *in turn*, could reinforce the idea that, if the material is perceived to involve an *Unknowing Child Victim*, then the material is “ethically neutral” data disconnected from child abuse’?⁹²⁷ Prichard and colleagues pointed to this possibility to explain why 10.3 per cent of participants in their study agreed with the statement ‘[w]hatever harms might occur in the production of child pornography, no further harm is perpetrated just from viewing the material’.⁹²⁸

There is a related, and potentially more concerning interpretation. Even though almost all participants identified an effect on the *Knowing Child Victim*, two fifths of participants perceived there would be no effect for the *Unknowing Child Victim* (see, 6.7.3). Does this represent an area of ambiguity that could, for an Opportunistic Offender, weaken the internal inhibitions against offending? It is not suggested that participants in this sample — or digital natives more generally — who lack awareness, are vulnerable to offending per se. Other situational factors and opportunity itself are also relevant (see, 3.5). That said, given the particular vulnerabilities of the Opportunistic Offender, this area of ambiguity may suggest a soft spot in the prevention armoury.⁹²⁹ Nor is it the only gap; roughly one in five participants lacked awareness about the effect of viewing on *Other Offenders* and *Society* (see, 6.7.2). This raises a further question as, even though the gaps in awareness are considerably smaller for the *Viewer* and the *Knowing Child*, does the

⁹²⁷ Prichard et al, above n 2, 226; Prichard et al, above n 461, 997.

⁹²⁸ Prichard et al, above n 2, 230.

⁹²⁹ Cornish and Clarke, above n 507, 63.

lack of ambiguity within these Effect Categories offset ambiguity within the other domains?

Turning first to the *Viewer*, for an effect identified under this Effect Category to offset the areas of ambiguity identified above, two further conditions may be relevant. The first is that a potential offender would have to perceive such an effect as adverse, while the second is that a potential offender would have to overcome the general cognitive bias, whereby individuals tend to underestimate the likelihood of a negative consequence befalling them.⁹³⁰

Even accepting that the former condition could be satisfied — which is not necessarily the case given that the potential for viewing to play a role in preventing child sexual abuse was recognised (see, 6.7.4.1) — the latter may present a problem. This study showed that a large proportion of responses were qualified (e.g., ‘may’ and ‘might’), suggesting a level of doubt about the likelihood that the effect identified would in fact befall the viewer (see, 6.7.4.1).

Coupled with this, Siegfried and colleagues found that individuals who use CEM online (including those who view, download and share CEM) appear to have a different ‘personal, moral compass’ to individuals who do not.⁹³¹ Relevantly, the researchers interpreted this to mean that while such offenders may comprehend that the viewing of CEM is ‘socially illegal’ — that is, wrong at the social level — it is not ‘wrong’ for them at the individual level.⁹³² Put another way, even if an individual acknowledges the potential for viewing to have an adverse effect on a viewer in the abstract, this does not guarantee a potential offender would translate such an effect to himself (or herself). As a result, it may be imprudent to give too much weight to the small gap in awareness with respect to the *Viewer* as sufficient to offset ambiguity in other domains.

⁹³⁰ Frank P McKenna, ‘It Won’t Happen To Me: Unrealistic Optimism or Illusion of Control?’ (1993) 84(1) *British Journal of Psychology* 39, 39 (explaining that this has been called ‘unrealistic optimism’ in the psychological literature); William M P Klein et al, ‘Self-Affirmation Moderates Effects Of Unrealistic Optimism and Pessimism on Reactions to Tailored Risk Feedback’ (2010) 25(10) *Psychology and Health* 1195.

⁹³¹ Siegfried, Lovely and Rogers, above n 495, 294.

⁹³² *Ibid.*

With respect to the *Child Victim*, this study revealed a substantial variation in participants' perceptions of whether viewing would have an effect on the child depending on knowledge (see, 6.7.3). As admitted previously, since participants were not asked how likely they thought it was that a child would be unknowing, there is an unknown implicit to this finding (see, 6.7.3).

In addition, it is possible that the study conflated two conditions in exploring participants' perceptions: (a) knowledge of the existence of the image per se; and, (b) knowledge of the likelihood that the image was being viewed per se. As a further point, it may be that from the perspective of the individual viewing the material, a third option is also relevant; namely, the likelihood that the child knows that they, the individual, is viewing the image. If the existence of either of the latter conditions was enough to prompt the perception that the child was unknowing, this may indicate that the likelihood of a child being unknowing was reasonably high. That said, there might also be other cues that preclude the idea that the child has knowledge (e.g., children who are very young, intoxication and covertly recorded material).⁹³³

In summary, to answer the question posed above, public perceptions reveal the existence of soft spots in the prevention armoury that may adversely affect the offending readiness of an Opportunistic Offender. The gaps in digital natives' knowledge of the law suggest ambiguity about the criminality of viewing material definable as CEM, and the gaps in awareness bring into question the moral clarity of this prohibition. In other words, there is alignment between the gaps identified in the perceptions of digital natives' and the particular vulnerabilities of the Opportunistic Offender.

7.2.3 What Do Public Perceptions Reveal about the Duty on the State to Publicise the Law and Give Fair Warning of Criminalisation?

In Chapter 4, the relationship between the State and the citizen was examined pursuant to two fundamental duties that rest with the State: the duty to publicise the law, and the duty to give fair warning of criminalisation to citizens. It was contended that this examination provided a principled basis upon which to critique the existence of the blind spot identified in the Australian policy architecture (see, 3.3). Further

⁹³³ Martin, above n 336, 267–287.

substantiating this policy blind spot and the relevance of these duties, the study of judges' sentencing remarks in Chapter 5 largely dismissed the possibility that such remarks were an exception to the policy blind spot, due to the three limitations identified in that chapter (see, 5.5.3). As foreshadowed in Chapter 4, this chapter now considers what further light the results of the study of public perceptions, undertaken in Chapter 6, can shed on whether the State is fulfilling these duties.

The starting point for this discussion is that the acts discussed in this part are crimes under Australian law (see, 1.2 generally). Under the State's duty to publicise the law, the State should ensure that the law is 'sufficiently publicised' to prevent the possibility that people will commit an offence through ignorance.⁹³⁴ While this does not require that the public must know the minutiae of the criminal law, it does mean that the public should know 'roughly' what the law says, at least where the prohibition has general application.⁹³⁵

In Chapter 4, a number of factors were identified that underlined why the prohibition on accessing CEM warranted consideration as a law of general application; these included the possibility that the viewing of CEM may be becoming more mainstream within the general population as discussed above (see, 4.2.4). This prompted an examination of the four steps identified by Ashworth (see, 4.3). The tentative conclusion was drawn that there was reason to believe the State may have fallen short of its duty to publicise the prohibition on accessing as it appears under Australian law. It was thus admitted that there was a possibility that an individual could commit a crime from ignorance of the law in the first instance.⁹³⁶

Admittedly, the findings of Chapter 6 suggest that the likelihood of someone contravening the prohibition on accessing out of ignorance varies. More than 90 per cent of participants knew it was a crime for someone to look deliberately at an explicit and sexualised image of a person under the age of 18 years old (see, 6.7.1). Yet, respectively, more than one in three and one in five participants mistakenly thought viewing virtual-CEM and reading explicit written material was legal (see, 6.7.1). In other words, even if an average citizen knows that the prohibition on accessing

⁹³⁴ Ashworth, above n 570, 101–102.

⁹³⁵ Gardner, above n 606, 44–45.

⁹³⁶ Ashworth, above n 570, 102.

captures the viewing of images of real people under the age of 18 years old, they may be ignorant of the fact that this prohibition also prohibits the viewing of virtual-CEM and the reading of explicit written material.

As a further point, if participants in the 18–30 year old cohort did not know the law in these areas, gaps in awareness may be larger for younger cohorts — a possibility that warrants further attention given virtual-CEM may be part of a genre consumed by young people.⁹³⁷ In other words, and underlining Ashworth’s point about the importance of communicating the scope of the criminal law to children, in spite of the ‘real challenge’ this presents, younger cohorts may have a dual vulnerability, as victims and also as offenders.⁹³⁸

Further, it is difficult to identify citizens for whom knowledge of the law for virtual-CEM and written material might affect. This study found that the use of adult pornography and P2P networks was associated with a lower likelihood of correctly identifying it was a crime to view these types of CEM, along with being male for text-based CEM (see, 6.7.1). Although the explanatory power of these variables was weak, this finding perhaps provides some further direction about who might be ignorant (see, 6.7.1). To that end, the findings of Chapter 6 add weight to the tentative conclusion that the State may have fallen short of its duty to publicise the law (see, 4.3 generally). The findings of Chapter 6 do three key things. They *confirm* the possibility that the prohibition on accessing may be contravened as a result of ignorance; they *indicate* the types of material for which ignorance is most likely; and, at the very least, they *hint* at variables that may be associated with this likelihood.

The duty on the State to give fair warning of criminalisation to citizens provides another viewpoint from which to examine the results of Chapter 6. As set out in Chapter 4, this duty is concerned with the promotion of ‘predictable liability’ — liability that is, or can be anticipated, and is not surprising.⁹³⁹ As noted above, there is

⁹³⁷ McLelland and Yoo, above n 282, 93 ; Mark McLelland, ‘The World of Yaoi: The Internet, Censorship and the Global “Boys’ Love” Fandom’ (2014) 23(1) *Australian Feminist Law Journal* 61 77.

⁹³⁸ Ashworth, above n 570, 105.

⁹³⁹ Chan and Simester, above n 645, 390.

a possibility that some aspects of the law with respect to the accessing of CEM are not ‘sufficiently publicised’, and the law may be contravened out of ignorance.⁹⁴⁰

On its face, this calls into question whether the State has given citizens fair warning of criminalisation, but it is not definitive. This is because, as examined in Chapter 4, the existence of ‘moral clarity’ around a particular behaviour may give fair warning, even when the offence itself is unknown.⁹⁴¹ In considering this further, the case of *Christian and others v The Queen* [2007] 1 LCR 726 provided a practical example of how the concept of moral clarity can apply beyond legal theory. This case suggests that an appropriate measure of whether the degree of moral clarity is sufficient to meet the requirement of fair warning is whether it is ‘impossible to believe’ that someone would be unaware that the behaviour was ‘wrong’ (see, 4.4.4).⁹⁴² Even though, as admitted in Chapter 4, this is a somewhat vague measure, it nonetheless provides a practical benchmark against which to consider the results of Chapter 6.

As a starting point, the vast majority of participants in this study knew it was a crime to view explicit and sexualised images of a person under the age of 18 years old (see, 6.7.1). Most participants were also aware of a range of effects from viewing such material (see, 6.7.3). The effects participants identified largely aligned with the explanations for criminalisation reviewed in Chapter 2. This was taken to suggest that participants in this sample were aware of the types of explanations that are said to justify the criminalisation of viewing material involving a real child (see, 6.8).

These results suggest that there is very little basis upon which to conclude that the State has not given fair warning in this regard. Yet, the same cannot be said for material that does not involve a real child, and this represents one of the most important empirical findings of this thesis. For example, the finding that one in three participants mistakenly thought viewing virtual-CEM was legal (see, 6.7.1), calls into question whether someone who viewed such material ‘can be fairly said to have chosen the behaviour and its consequences’.⁹⁴³

⁹⁴⁰ Ashworth, above n 570, 102.

⁹⁴¹ Gardner, above n 606, 44–45.

⁹⁴² *Christian and others v The Queen* [2007] 1 LCR 726 [55].

⁹⁴³ Ashworth, above n 640, 155.

Further underlining this question, the results of Chapter 6 reveal that in most instances, between a fifth and a third of participants were unaware that viewing virtual-CEM would have any effect on the *Viewer*, *Other Offenders* and *Society* (see, 6.7.3). This finding suggests that for a sizable proportion of this sample, and perhaps digital natives more widely, the moral clarity around the viewing of virtual-CEM is low. This tends to suggest that, for virtual-CEM at least, it is far from ‘impossible to believe’ that someone would be unaware that viewing such material was ‘wrong’.⁹⁴⁴ The potential for a lack of knowledge of the law to overlap with a lack of awareness of any justification for criminalisation, thus suggests a real possibility that liability would be a surprise.⁹⁴⁵

As a final point, this discussion also gives cause to consider the related issue of fair labelling (see, 4.4.4). This principle is in issue because the findings of Chapter 6 indicate a potential gap between the perceived degree of wrongdoing involved in the act of accessing virtual-CEM, versus CEM involving a real child. Compared to CEM involving a real child, fewer participants thought that an act of viewing ‘should’ be treated as a crime for virtual-CEM, and a consistently smaller proportion of participants identified that the viewing of virtual-CEM would have an effect on the *Viewer*, *Other Offenders* and *Society* (see, 6.7.3). The limitations of this study (see, 6.9) mean it is not possible to say whether this is evidence of the kind of ‘widely felt distinctions’ identified by Ashworth.⁹⁴⁶ That said, these indicators suggest, at a minimum, that the current definition of CEM may cover types of conduct that are regarded differently, and give cause to consider further the merit of reforming the definition of CEM so that the law reflects this difference.⁹⁴⁷

7.3 LESSONS FOR PREVENTION – THEORY TO RECOMMENDATIONS

7.3.1 *Public Policy*

It is a key recommendation flowing from this thesis that Australia should address the policy blind spot identified in Chapter 3, by incorporating a strategy that addresses the Second Aim of primary prevention into the national policy architecture (see, 3.3).

⁹⁴⁴ *Christian and others v The Queen* [2007] 1 LCR 726 [55].

⁹⁴⁵ Chan and Simester, above n 645, 390.

⁹⁴⁶ Ashworth and Horder, above n 571, 78.

⁹⁴⁷ *Ibid* 79.

Such a strategy should address the issues identified with public perceptions that may have adverse implications, from the perspective of ensuring the offending readiness of the Opportunistic Offender remains ‘qualified’.⁹⁴⁸ This means developing and implementing situational initiatives that flick the ‘moral scruples’ switch to ‘on’.⁹⁴⁹

This strategy should include targeted initiatives that seek to heighten (or maintain) inhibitions for offending at, or near, the point of onset.⁹⁵⁰ Initiatives that seek to ‘set clear rules’ and ‘alert conscience’ in order to build an Opportunistic Offender’s awareness around the parameters of permissible and impermissible behaviour are examples (see, 3.5).⁹⁵¹ Moreover, further to being consistent with efforts to prevent the Opportunistic Offender from experiencing onset (see, 3.6), such initiatives would coincide with the duties on the State to publicise the law and give fair warning of criminalisation (see, Chapter 4).

Further to addressing the policy blind spot, a suitably equipped body or agency should be given the mandate and resources to develop and manage initiatives under the Second Aim. As discussed earlier, while the functions of the eSafety Commissioner expressly cover the First Aim of primary prevention, they do not stretch to the Second Aim.⁹⁵² As such, one option would be to extend the remit of the eSafety Commissioner to include initiatives under the Second Aim of primary prevention, given the overlap between these two aims. On this point, initiatives that address the Second Aim of primary prevention fit within Australia’s obligations under the *Protocol*, which recognises the importance of raising public awareness to, relevantly, ‘reduce consumer demand’ and realise the right of children to be protected.⁹⁵³

Recommendation 1: Address the Second Aim of primary preventing within the overarching public policy architecture and give a suitably equipped body the mandate and resources to develop and manage initiatives under this strategy.

⁹⁴⁸ Cornish and Clarke, above n 507, 67.

⁹⁴⁹ Ibid 80.

⁹⁵⁰ Ibid 67; Jung et al, above n 449, 308; Wortley and Smallbone, above n 50, 119–120.

⁹⁵¹ Cornish and Clarke, above n 507, 67.

⁹⁵² *Enhancing Online Safety for Children Act 2015* (Cth) s 15.

⁹⁵³ *Optional Protocol*, Preamble.

7.3.2 Legislation

The findings of Chapter 6 raise a question about fair labelling, outlined above, which gives cause to consider the merit of re-formulating current definitions of CEM so that they do not cover two types of conduct that are regarded differently (see, 7.2.3). That is, the accessing of material that involves a real child in its creation and that, which does not — although it is accepted that on either side of this divide, there will be material that is ambiguous. Admittedly, there are different ways to interpret public perceptions on this point.

Tadros makes the point that the public at times have ‘mistaken ideas’ that are not desirable, or appropriate, to have reflected in criminal law.⁹⁵⁴ Taking this view, the proportion of participants whose perceptions differ could be considered to be those members of the public who hold perceptions that the criminal law could play a role in changing; albeit that for such a process to take place, there is a knowledge gap that needs to be overcome in the first instance.

Taking another view, there is a bigger question about the criminalisation of virtual-CEM that, as Australian definitions already cover virtual-CEM, is really a question about decriminalisation. This thesis has not attempted to contribute directly to the debate about whether virtual-CEM should be decriminalised *per se*. On this point, most participants in this study perceived that the viewing of virtual-CEM would have at least one effect within one Effect Category (see, 6.7.3). Participants were not asked whether they believed that the effect they identified *justified* criminalisation, meaning it is not possible to reflect on whether participants took that view, or whether — despite the effect — they ascribed to the view that criminalisation is problematic.⁹⁵⁵ The overlap between the effects identified by participants, and those identified in the literature, may suggest some degree of awareness of the types of effects that are perceived to provide *some* basis for criminalisation in the literature (see, Chapter 2).

However, on either interpretation, it does not follow that there is no merit in re-formulating the definition of CEM under Australian law. In fact, doing so may clarify the scope of the law and address the knowledge gap, and at the same time,

⁹⁵⁴ Tadros, above n 699, 71.

⁹⁵⁵ See, eg, Ost, above n 270, 245.

acknowledge the potential for difference, and bring the law into line with the principle of fair labelling. It would be premature to consider re-formation of the definition without further research to explore the wider implications of such a change for law enforcement agencies, and the wider criminal justice system.

Recommendation 2: Further research exploring the merits of re-formulating definitions of CEM to distinguish between material that involves a real child in its creation, and material that does not.

7.3.3 Judicial Practice

In Chapter 5, questions about how to address the limitations of sentencing remarks within the scope of judicial practice were identified (see, 5.5.3). Subject to further research to explore whether the patterns observed in Tasmania and Victoria are also evident in other jurisdictions, two general recommendations follow from this study. These include encouraging judges to: (a) include one or more normative messages in sentencing remarks for accessing offences; and, (b) ensure that at least one of the messages they give explains why the act of accessing (viewing) is morally wrongful, and in doing so, address any conditions incumbent on that explanation (see, 5.5.1 for examples).

The remaining limitation relates to access and availability, and media reporting. As noted previously, if other jurisdictions followed the lead of Tasmania in publishing sentencing remarks (see, *Table 1*), this may go some way to remedying this limitation. Nonetheless, the question of media reporting remains an unknown that warrants further research (see, 5.6).

Recommendation 3: Encourage judges to include at least one normative message in sentencing remarks for accessing offences and ensure that at least one message they give explains why the act of accessing (viewing) is itself morally wrongful. In doing so, further conditions should be addressed.

7.4 FUTURE RESEARCH DIRECTIONS

Further to the discrete research directions identified in Chapter 5 (see, 5.6), three areas for future research are identified regarding prevention.

One, there is a need to continue to build the evidence base around public knowledge and awareness of this area of law in Australia. Even though acts of accessing invariably cross-national borders (e.g., the accessed material is hosted overseas), the policy and legislative settings under which such behaviour takes place are national. In other words, the *scope* of criminalisation, inclusive of the types of material that are prohibited, is determined nationally (or, more accurately in this instance, federally).

Thus, while evidence about public perceptions from other jurisdictions may well be useful to signpost areas for study, research with national samples is crucial where the intention is to inform and guide national prevention. Conversely, if the intention were to inform and guide prevention in other jurisdictions, it would be most useful to explore public perceptions within that jurisdiction in recognition that the policy and legislative settings may, and likely will, be different. Moreover, and on the latter point, this thesis emphasises that in exploring public perceptions, attention should be given to knowledge of the law and awareness of rationales for the law, as these are both relevant through the lenses of crime prevention (Chapter 3) and legal theory (Chapter 5).

That said, and returning to the Australian context, the replication of findings, and the increasing of sample size and representativeness, may reveal further trends around knowledge and awareness that could help shape and inform prevention. For example, if international university students were a cohort whose level of knowledge of the law was particularly low — perhaps because they come from jurisdictions where laws around such material differ — this would provide a basis upon which to design and implement targeted strategies for this cohort.

Two, a further area for future empirical research in Australia would be to explore whether the knowledge and awareness of younger cohorts of ‘digital natives’⁹⁵⁶ differ from the older cohorts, such as the sample in this study. For instance, this might be expected as a result of changes in ‘digital fluency’ over the years.⁹⁵⁷ In addition,

⁹⁵⁶ Prensky, above n 178, 2.

⁹⁵⁷ Qian Emily Wang, Michael D Myers and David Sundaram, ‘Digital Natives and Digital Immigrants: Towards a Model of Digital Fluency’ (2012) 5(6) *Business & Information Systems Engineering* 409, 409 (defining ‘digital fluency’ as ‘the ability to reformulate knowledge and produce information to express oneself creatively and appropriately in a digital environment’).

exploring the perceptions of younger cohorts is important, as young people may be at risk of both victimisation and offending; there may be a dual vulnerability. Particularly if, as suggested elsewhere in this thesis, the types of material for which levels of knowledge are generally lower is of interest to younger cohorts. Thus, such research could help to inform the content of the types of programmes that are aimed at young people, as discussed earlier (see, 3.3).

Three, and more broadly, further research into the antecedents of offending onset is important to guide and inform prevention strategies. Currently, the lack of research into how onset occurs is a limiting factor. While this thesis demonstrates how public perceptions can offer insight into the value of initiatives under the Second Aim of primary prevention, further research into how onset occurs would help to ensure the design, development and delivery of such measures offer the best chance of reducing onset (e.g., the feasibility of targeted messaging initiatives).⁹⁵⁸

7.5 CONCLUSION

For some time, judges and academics alike have pointed to the possibility of a gap between public perceptions of CEM offending and the law. While empirical research began to emerge sporadically almost 20 years ago,⁹⁵⁹ researchers have only given more sustained attention to the possibility of a ‘disjuncture’ in the last decade.⁹⁶⁰ Yet, as identified at the outset of this thesis, until recently, Australian research has been very limited. In particular, it has not examined public knowledge of the law.

This thesis took a unique approach to exploring the perceptions of a sample of young adults towards the criminalisation of CEM — a cohort described as ‘digital natives’.⁹⁶¹

⁹⁵⁸ Note, in 2016, the Australian Research Council granted funding to a project that explores the use of automated internet warnings to prevent the viewing of ‘barely legal’ pornography with potential implications for this area see Australia Research Council, *Research Details* (Australian Government, 2016) <<https://rms.arc.gov.au/RMS/Report/Download/Report/d6b15b2b-3a50-4021-8e6f6c7ef1cb a553/0>>.

⁹⁵⁹ McCabe, above n 137, 73–76.

⁹⁶⁰ Lam, Mitchell and Seto, above n 140, 173–201; Liddell and Taylor, above n 2, 43; Prichard et al, above n 2, 234.

⁹⁶¹ Prensky, above n 178, 2.

By gauging this sample's knowledge of criminalisation and their awareness of the effects of viewing, this thesis broke new ground.

The findings in these two areas demonstrate the significant value of directly examining knowledge, and the importance of taking an exploratory approach. This research is the first to marry evidence about public perceptions with criminological and legal theory and identify the implications for preventing onset. This research is also the first to examine the potential educative value of the messages contained in judicial sentencing remarks. The findings about public perceptions and judicial sentencing remarks, together with the connections made between theory, policy and practice, and the resulting recommendations, make a substantial and original contribution to this field.

On a final note, concerning the practical value of this thesis collectively, the arguments and evidence presented here add weight to the case that tackling the online viewing of CEM effectively requires an overarching policy architecture that addresses the Second Aim of primary prevention. Informed by crime prevention theory, the empirical findings of this thesis bolster this call. The legal theory arguments underline that it is the responsibility of the State to respond to fulfil its duties to citizens. This thesis does not claim to address the wider problem of CEM offending; it merely seeks to shed light on one part of the broader problem and identify why it should be addressed.

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APPENDIX 1: INFORMATION SHEET



FACULTY OF LAW

WHAT PEOPLE THINK ABOUT ONLINE MATERIAL INVOLVING CHILDREN AND THE LAW

Information sheet for people considering completing the survey

You are invited to participate in a study of Internet users' views about the law and how it applies to a range of online material about children. The study is being conducted and funded by the University of Tasmania.

What is the purpose of this study?

The purpose is to investigate what Internet users' think about the law in this area.

Why have I been invited to participate?

Internet users between the age of 18 and 30 are invited to complete the survey.

What will I be asked to do?

- You will be asked questions about how the law operates in your state or territory.
- You will also be asked for your opinion about different types of online behaviour.
- You will not be asked to look at any images.
- You will not be asked whether you have seen illegal material, shared it, or produced it.
- You will not be asked whether you have ever been the victim of a sexual assault.
- The survey takes about 20 minutes to complete.

Are there any possible benefits from participation in this study?

This research will inform policy makers about public knowledge and attitudes towards the law around online behaviour.

Are there any possible risks from participation in this study?

Remember that you can quit the survey at any time. You may be distressed by some of the questions. If you are at all concerned that you may find some of the questions distressing, it may be beneficial for you to discuss your participation in this survey with your general practitioner, another health professional you may see, a trusted family member or a personal friend prior to participating. Alternatively, we have provided below the details of some anonymous counselling services.

- International – *Befrienders Worldwide* provide an online list of helplines operating around the world – see the following website:
<http://www.befrienders.org/>
- Australia – *Lifeline Australia* has a 24 hours crisis telephone service (phone 13 11 14) as well as an online chat service between the hours of 7.30 to 10.30pm
- AEST on Mondays to Thursday and this service can be accessed via
<http://www.lifeline.org.au/FindHelp/Online-Services/crisis-chat>.
- Alternatively, both *BeyondBlue* (1300 22 4636) and *SANE Australia* (1800 18 7263) have a national info/help line.

What if I change my mind during or after the study?

You are free to withdraw at any time without providing an explanation.

What will happen to the information when this study is over?

The answers you provide in the survey will be kept for at least 6 years. Your participation will be anonymous and confidential. We will not collect identifying information such as IP addresses and we will not use cookies to track user activity. All data we do collect will be password protected and accessible only by staff at the University of Tasmania.

How will the results of the study be published?

Results of this study may be published. You will not be identifiable in the publication of the results.

What if I have questions about this study?

If you have any questions about the research, please contact the researchers at Charlotte.Hunn@utas.edu.au.

This study has been approved by the *Tasmanian Social Sciences Human Research Ethics Committee*. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tas) Network on +61 3 6226 7479 or email human.ethics@utas.edu.au. The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number H0012315.

If you are aged 18 years or older, you understand the information provided above and you wish to complete the survey, please proceed to the survey.

You can print this information sheet and keep it

APPENDIX 2: SURVEY INSTRUMENT

1. Please confirm that you have read and understood the Information Sheet.

☐ I can confirm this

Introduction

Thank you for agreeing to participate in this study.

There are three sections to this survey. At the beginning of each section, you will be given instructions. Please read them carefully.

You are being asked about your knowledge and for your opinion. There are no right or wrong answers.

This survey is about a subject that is difficult for some people, but it is important for researchers to understand what people know and think about this area.

Remember that you can quit the survey any time.

2. Please select the state or territory in which you live.

3. In what year were you born?

4. What is your gender?

5. What is the highest level of high school education you have completed? If your study was part time, give the number of years of equivalent full-time study.

6. What is the highest level of education you have completed since leaving high school?

7. Which of the following best describes what you were doing last week?

- ☐ Working for pay or self-employed
- ☐ Unemployed – looking for work
- ☐ Retired from paid work
- ☐ A full-time or part-time school or university student
- ☐ Household duties
- ☐ Helping a family member
- ☐ Living with a disability
- ☐ Other (please specify)

8. What is your current marital status?

9. Are you a parent?

- ☐ Yes
- ☐ No
- ☐ Other (please specify)

10. Which option best describes where you live?

Section One: The Law

The questions in this section are about the law and how you think the law works in your state or territory.

11. Have you ever read or heard the term 'child pornography' or 'child exploitation material'?

- ☐ Yes
- ☐ No

12. What do you think this type of material is?

13. What types of online behaviours do you think are crimes under child pornography law in your state or territory?

14. Do you think it is a crime for someone to just look at child pornography online in your state or territory?

- ☐ Yes
- ☐ No
- ☐ Other (please specify)

15. Please select the age at which you think a person is no longer defined as a child under child pornography law in your state or territory.

16. Please select the age at which you think a person can legally consent to sex with an adult under the law in your state or territory.

Laws about looking at images and videos of children online are different around the world. In this section there are nine short multiple choice questions about the law in Australia. You will be asked to read a very short description and identify whether you think it is a crime for someone to deliberately look at the type of material described online in your state or territory.

17. Looking at an image of a man engaging in an explicit sexual act with an 8 year-old girl.

- ☐ This is a crime
- ☐ This is not a crime
- ☐ I don't know

18. If instead of a real child, this image showed a drawing of a cartoon character that looked like a man engaging in an explicit sexual act with another cartoon character that looked like a child, would looking at this image be a crime?

- ☐ This is a crime
- ☐ This is not a crime
- ☐ I don't know

19. If the scene involving the real child was described in words in an online chat would reading this be a crime?

- ☐ This is a crime
- ☐ This is not a crime
- ☐ I don't know

20. Looking at a photo of a naked 1-year-old child in a bath, such as one that might be found in a family photo album?

- ☐ This is a crime
- ☐ This is not a crime
- ☐ I don't know

21. Looking at a photo taken by a 13-year-old of herself in a mirror with her mobile phone. The photo shows her naked from the waist up, and she is holding the phone with one hand while her other hand rests by her side.

- ☐ This is a crime
- ☐ This is not a crime
- ☐ I don't know

22. Looking at an image showing the head of a 10-year-old TV star that has been copied and pasted onto the body of a naked man with an erection. This image has been made using a computer program.

- ☐ This is a crime
- ☐ This is not a crime
- ☐ I don't know

23. Looking at an online video of two naked 8-year-old girls lying on a bed sleeping. The film has been edited to focus on the bottoms of the children and is set to a pop song about sexual activity.

- ☐ This is a crime
- ☐ This is not a crime
- ☐ I don't know

24. If the online video described in the previous question showed an animation of cartoon characters that looked like children, instead of showing real children, would looking at this video be a crime?

- ☐ This is a crime
- ☐ This is not a crime
- ☐ I don't know

25. Looking at an online video showing a public change room at a swimming pool with men and young boys getting dressed and undressed. Some of the footage shows the men and boys naked. The film appears to have been recorded secretly.

- ☐ This is a crime
- ☐ This is not a crime
- ☐ I don't know

Section Two: Scenarios

In this section you will be asked for your opinion about three short made up stories. This may require you to think carefully but remember there are no right or wrong answers. Please answer these questions as if they describe real events.

Scenario One

Matt is 28. He lives and works in the capital city of your state or territory. Sometimes, when Matt gets home from work he sits at his computer and looks at adult pornography. One night, while looking at adult pornography online, Matt sees a link to child pornography. He is curious, and he clicks on the link to see the photo. Matt looks at the photo. It shows a man engaged in an explicit sexual act with a girl who looks about 10 years old.

26. Do you think Matt's actions should be treated as a crime?

- ☐ Yes
- ☐ No
- ☐ Other (please specify)

It is a couple of months since Matt first looked at child pornography. Matt now sits at his computer and looks at child pornography most nights after he gets home from work. Matt doesn't pay to look at these photos instead searching for websites where he can look at them for free.

Hint: In answering these questions, you could think about whether there may be any effect on the behaviour of the character(s) and/or any effect on the attitudes of the character(s).

27. Think about Matt looking at these photos. If any, what kinds of effects do you think this will have on Matt?

28. Think about the adults shown abusing children in these photos. If any, what kinds of effects do you think Matt looking at these photos will have on them?

29. Think about the people who take these kinds of photos. If any, what kinds of effects do you think Matt looking at these photos will have on them?

30. Think about the people who share these kinds of photos online. If any, what kinds of effects do you think Matt looking at these photos will have on them?

31. Think about the questions that you just answered. Do you think any of the effects of Matt looking at these photos on the adults shown abusing children, the people who take and/or share these photos online would be greater if Matt downloaded copies of the photos onto his computer?

☐ Yes

☐ No

Why is that?

32. What about if Matt paid to look at these photos, would any effect be greater?

☐ Yes

☐ No

Why is that?

33. Think about society. If any, what kinds of effects do you think Matt looking at these photos will have on society?

Scenario Two

It turns out that the 10-year-old girl in the photo that Matt first looked at is now 18. Her name is Carly. Carly does not know that the photo was taken, or that the photo is online and that people are looking at it. The man who abused Carly and the man who took the photo have been caught by the police and are now in jail.

Hint: In answering these questions you could think about whether there may be any effect on the behaviour of the character and/or any effect on the attitude of the character towards herself and/or other people.

34. Think about Carly. If any, what kinds of effects do you think Matt looking at the photo of Carly will have on her?

Remember: Carly does not know the photo was taken or that it is online.

35. Do you think any effect on Carly would be different or greater if Carly knew that the photo had been taken and that people were looking at it online?

- ☐ Yes
- ☐ No

Why is that?

Thinking about Scenario One and Two

36. In answering these questions about Matt has your opinion changed about whether Matt's actions should be treated as a crime?

- ☐ Yes
- ☐ No
- ☐ Other (please specify)

Scenario Three

Josh is 30 and he also lives and works in the capital city of your state or territory. Josh often looks at funny pictures that people upload to a photo sharing website. One day, someone posts a computer animation showing characters that look like children. The characters are performing sexual acts. Josh watches the animation and then follows a link to a website advertising more of these kinds of computer animations.

37. Do you think Josh's actions should be treated as a crime?

- ☐ Yes
- ☐ No
- ☐ Other (please specify)

It is a couple of months since Josh first looked at these computer animations. Josh now sits at his computer and looks at these images most nights when he gets home from work.

Hint: In answering these questions you could think about whether there may be any effect on the behaviour of the character(s) and/or any effect on the attitudes of the character(s).

38. Think about Josh looking at these computer animations. If any, what kinds of effects do you think looking at these computer animations will have on Josh?

39. Think about the people who make these computer animations. If any, what kinds of effects do you think Josh looking at these computer animations will have on them?

40. Think about the people who share these computer animations online. If any, what kinds of effects do you think Josh looking at these computer animations will have on them?

41. Think about the question that you just answered. Do you think any of the effects of Josh looking at these computer animations on the people who make and share them online would be greater if Josh downloaded copies of them onto his computer?

☐ Yes

☐ No

Why is that?

42. What about if Josh paid to look at these computer animations, would any effect be greater?

☐ Yes

☐ No

Why is that?

43. Think about society. If any, what kinds of effects do you think Josh just looking at these computer animations will have on society?

☐ Yes

☐ No

Why is that?

44. In answering these questions about Josh has your opinion changed about whether Josh's actions should be treated as a crime?

☐ Yes

☐ No

Why is that?

Section Three

45. How often do you use the internet?


☐ Multiple times a day

☐ Every day

☐ Several times a week Once a week

☐ Once a month or less

46. On average, how many hours a day do you spend on the internet (excluding for work related activities?)

1  24

47. Do you use peer-to-peer file-sharing networks?

☐ Yes

☐ No

☐ Other (please specify)

48. How often do use peer-to-peer networks?

- ☐ Multiple times a day
- ☐ Several times a day
- ☐ At least once a day
- ☐ At least once a week
- ☐ At least once a month
- ☐ Less than once a month

49. Have you ever looked at adult pornography online?

- ☐ Yes
- ☐ No
- ☐ Other (please specify)

50. How often do look at adult pornography online?

- ☐ Multiple times a day
- ☐ Several times a day
- ☐ At least once a day
- ☐ At least once a week
- ☐ At least once a month
- ☐ Less than once a month
- ☐ Once every couple of months
- ☐ Only as a once-off

Thank you for taking part in this study

APPENDIX 3: ADDITIONAL TABLES

Table 14 Collapsed variables for sample demographic variables

Variable	Description	Frequencies	Variable (collapsed)	Frequencies (%)
Gender	Male	244	N/A	244 (48.4)
	Female	260		260 (51.6)
Age	1986	13	Under 25	226 (45.6)
	1987	54		
	1988	52		
	1989	43		
	1990	64		
	1991	40		
	1992	40	25 and over	270 (54.4)
	1993	31		
	1994	24		
	1995	34		
	1996	34		
	1997	20		
	1998	47		
	1999	8		
Education	None	133	Secondary-Only	133 (26.4)
	Trade/apprenticeship	26	Non-tertiary	195 (38.7)
	Certificate/Diploma	169		
	Bachelor Degree	137	Tertiary	176 (34.9)
	Postgraduate	39		
Occupation	Working /self employed	273	Employed	273 (55.9)
	Unemployed	55	Unemployed	55 (11.3)
	Retired from paid work	0	N/A	N/A
	Full –time/Part-time school/university student	103	Student	103 (21.1)
	Household duties	57	Household duties	57 (11.7)
	Helping a family member	3	Other	16 (3.2)
	Living with disability	6		
	Other	7		
Marital status	Single	299	Single	299 (59.8)
	De facto	105	In a relationship	201 (40.2)
	Married	96		
	Separated	3	Other	4 (.8)
	Widowed	1		
Parent	Yes	135	Parent	135 (26.8)
	No	369	Not a parent	369 (73.2)
Location	A rural area	33	Towns and rural areas 113 (22.4)	
	A small town	36		
	A large town	44		
	A small regional city	31	Regional cities and suburbs 150 (29.76)	
	A large regional city	56		
	Outer suburbs (regional city)	46		
	Inner suburbs (regional city)	17		
	Outer suburbs (capital city)	125	Capital city and suburbs 241 (47.81)	
	Inner suburbs (capital city)	116		

Table 15 Collapsed variables for online behaviour variables

Variable	Description	Frequencies		Variable (collapsed)	Frequencies (%)
Internet use	Multiple times a day	442	N/A	N/A	442 (87.7)
	Everyday	58	N/A	N/A	58 (11.5)
	Several times a week	4	N/A	N/A	4 (.8)
P2P use	Yes	168	User	Multiple times a day	86 (17.06)
				Several times a day	
				At least once a day	
				At least once a week	46 (9.12)
				At least once a month	36 (7.14)
				Less than once a month	
	No	336	Non-user	N/A	336 (66.66)
	Other		Other	N/A	N/A
Adult pornography use	Yes	310	User	Multiple times a day	132 (26.19)
				Several times a day	
				At least once a day	
				At least once a week	
				At least once a month	178 (35.31)
				Less than once a month	
				Once every couple of months	
				Only as a once off	
	No	187	Non-User	N/A	187 (37.10)
	Other	7	Other	N/A	7 (1.38)

APPENDIX 4: PERMISSION TO REPRODUCE

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Professor Ian Freckelton QC
Barrister
617 Crockett Chambers
530 Lonsdale St
Melbourne, 3000, VIC, Australia

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